

The Rise of China and International Law

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The Rise of China and International Law

Taking Chinese Exceptionalism Seriously

CONGYAN CAI

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Foreword

The present book deals with two sides of a major question: the role of the People's Republic of China for the development of international law, and the role of international law for the development of China. Professor Congyan Cai of Xiamen University is well qualified to meet this formidable challenge. Widely traveled academically, he ably integrates perspectives from inside and from outside China.

Much has been written on different aspects of the role of the People's Republic of China for the international legal order. Apart from Judge Hanqin Xue's magisterial Hague Lectures,¹ however, the general question of the relationship between China and international law has, to my knowledge, not been addressed as comprehensively as in this book. Professor Cai, author, proceeds from a classical international relations perspective on rising and declining powers. The author pursues the question of what effect current international law has, or can have, on the way in which China acts, how China exists in the international community, and how China can shape international law.

The principal virtue of the book lies in the combination of current theoretical approaches and typologies with practical developments in specific areas. The author prepares the ground by identifying characteristic elements of present-day international law (Chapter Two) and of China (Chapter Three), combining self-understanding and external observation. The core part of the book consists of four chapters in which the author analyzes crucial elements of the relationship between China and international law. In Chapter Four he analyzes four regimes (Peace and Security; WTO and Investment Law; Human Rights; and Cybersecurity) from the perspective of a move from "norm compliance to norm entrepreneurship" (Chapter Four). Chapter Five reviews China's roles with respect to international institutions, ranging, as the author puts it, from China as an "outsider," to that of a "partner," a "member," and a "sponsor." Chapter Six deals, in an insightful way, with the changing role of Chinese courts regarding the application of international law. And Chapter Seven, entitled "Lawfare in Dispute Settlement," addresses the way in which China has approached formal international dispute settlement procedures, comparing particularly the South China Sea arbitration and procedures under the WTO

¹ Hanqin Xue, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (Leiden: Martinus Nijhoff Publishers, 2012).

dispute settlement system. The book concludes with a short Chapter Eight, entitled “Taking Chinese Exceptionalism Seriously.” On this basis, Professor Cai suggests that the situation of China is characteristically different from that of previously rising powers in that, today, China is integrated into a more developed international legal order.

The book is a valuable attempt to conceive the relevance of international law for what Professor Cai describes as the “rise of China.” To achieve this aim, he neither remains at high levels of abstraction nor does he confine himself to describing specific developments in certain fields. He rather identifies crucial points by applying pertinent typologies to relevant sets of facts. One need, of course, not agree with his general assessment and his specific analyses, but they offer important points of departure for an informed global scientific debate.

Professor Cai has prepared parts of this book during his nine-month visit in 2016 as a fellow at the Berlin-Potsdam Research Group “The International Rule of Law—Rise or Decline?” His project was particularly pertinent and fruitful in this context. Since 2015, the aim of the Research Group is to determine: Can we “under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms?” Observers may detect a Western perspective in this formulation. Be this as it may, the way in which this question is addressed by Professor Cai helpfully both integrates and transcends a Western perspective.

Georg Nolte

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Acknowledgments

This book builds on and purports to deepen a previous article titled “New Great Powers and International Law in the 21st Century,” which I published in the *European Journal of International Law* (Vol. 24, No. 3, 2013). I am deeply indebted to Professor Benedict Kingsbury and Professor José E. Alvarez, who hosted me as a Fulbright Scholar and a Global Research Fellow (2011–2012) at the New York University (NYU) School of Law, where I started my new research plan of “New Great Powers and International Law” and completed the draft of the aforesaid article.

Special appreciation should be forwarded to Professor Anthea Roberts from the Australian National University School of Regulation and Global Governance. Anthea and I share many academic interests. I am thankful that Anthea, during her working for Columbia University School of Law (CLS), invited me as a short-term visiting professor (December 2014) at the CLS. For the first time I talked with Anthea about my plan to write a book about China and international law while in New York. I highly appreciate the encouragement and support from her during my production of this book.

I must forward my gratitude to Professor Georg Nolte from Humboldt University School of Law, who in 2016 kindly invited me as a Senior Fellow to join the Research Group (KFG) engaging “The International Rule of Law—Rise or Fall?,” which Professor Nolte co-chairs with Professor Heike Krieger from the Free University of Berlin School of Law. Given that the rise of China has obviously raised a great concern for international rule of law toward which different observers and policymakers have different and competing views, I do benefit much from the involvement in the Research Group. As a matter of fact, the draft of Chapter Three of this book was completed and reported to the KFG during my stay in Berlin. I offer thanks to all members of the KFG for their very helpful comments.

Many colleagues, friends, and students have given much help for my production of this book. I should mention Professor Mingxin Zhu, Professor Huachun Guo, Dr. Yujia Wei, Dr. Yue Zhang, Ph.D. students Jie Liu, Yifei Wang, and Eric Klemm. In particular, Professor Nolte read my manuscript and wrote a very kind foreword; Professors Andrew Hurrell, Benedict Kingsbury, and Richard B. Stewart agreed to include my book in the Law and Global Governance Series. I am also grateful from my heart to many people for their encouragement and support during my academic career. In particular, they

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Chapter Six is based on my paper titled “International Law in Chinese Court during the Rise of China,” which was published at the *American Journal of International Law* (Vol. 110, No. 2, 2016). The Chinese version of Chapter Seven was recently published with some revisions in the *Chinese Yearbook of International Law* (2019).

This book is one of the outcomes of several research projects funded by China’s National Social Science Planning Office (NSSPO) and Xiamen University. They include “Improve Chinese Discourse in International Economic Legal Rules-Making” (15AZD081), “Improve Chinese Legal Discourse in the Sea-related International Affairs” (18VHQ007), and “The Rise of China and International Legal Order” (20720140000) and “China’s Comprehensive Participation in Global Governance and International Rule of Law” (17@ZH014). This book is also a part of the aforesaid project of “The International Rule of Law—Rise or Fall?” of the KFG.

Congyan Cai

Xiamen, China

Abbreviations

AB	Appellate Body
ADB	Asian Development Bank
AIIB	Asian Infrastructure Investment Bank
APEC	Asia-Pacific Economic Cooperation
APL	Administrative Procedural Law
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
BRI	One Belt and One Road Initiative
BRICS	Brazil, Russia, India, China, and South Africa
CAT	International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBRC	China Banking Regulatory Commission
CCP	Chinese Communist Party
CESCR	Committee on Economic, Social and Cultural Rights
CFIUS	Committee on Foreign Investment in the United States
CISG	United Nations Convention on Contracts for the International Sale of Goods
COC	Code of Conduct
COMECON	Council for Mutual Economic Assistance
DOC	Declaration on Conduct
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
FDI	Foreign Direct Investment
FIFD	Friends of Investment Facilitation for Development
FTA	Free Trade Agreement
G-7	Group of 7
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPCL	General Principles of Civil Law
HIL	Hegemonic International Law
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
ILC	United Nations International Law Commission
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
ITLOS	International Tribunal for the Law of the Sea

MFA	Ministry of Foreign Affairs
NAFTA	North American Free Trade Agreement
MFN	Most-Favored-Nation Treatment
NATO	North Atlantic Treaty Organization
NDB	New Development Bank
NGO	Nongovernmental Organization
NIEO	New International Economic Order
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
NRMs	Nonregional Members
NT	National Treatment
PCIJ	Permanent Court of International Justice
PFM	Preliminary Founding Member
PPP	Public-Private Partnership
PRC	People's Republic of China
R2P	Responsibility to Protect
RMs	Regional Members
ROC	Republic of China
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SCO	Shanghai Cooperation Organization
SCS	South China Sea
S&D	Special and Differential Treatment
SOEs	State-Owned Enterprises
SPC	Supreme People's Court
TAC	Treaty of Amity and Cooperation in Southeast Asia
TPA	Trade Promotion Authority
TPNW	Treaty on the Prohibition of Nuclear Weapons
TPP	Trans-Pacific Partnership
TPR	Trade Policy Review
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade and Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGGE	United Nations Group of Governmental Experts
UNSC	United Nations Security Council
UPR	Universal Periodical Review
USDOC	United States Department of Commerce
USSR	Union of Soviet Socialist Republics
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organization

1

Introduction

1. Research Background

Today, it is hardly disputable that China is rising as a new great power. The rise of China is one of the most, if not the most, fundamental events in the reconstruction of international relations in this century. Less certain, however, is how China is rising and what China's rise may bring to the world, including international legal order; especially, how China, a rising new great power and once the "Middle Kingdom" for centuries, engages the U.S., the most powerful state and "a city on a hill." The potential ramifications, rife with uncertainties, have spurred different and even conflicting arguments and speculations among commentators and policymakers.

The optimists are confident that today's international system can well manage the rise of China. For instance, Ikenberry is critical of the viewpoint that China's rise will bring the American era to an end and the Western-oriented world order will be replaced. According to Ikenberry,

That course, however, is not inevitable. The rise of China does not have to trigger a wrenching hegemonic transition. The U.S.-Chinese power transition can be very different from those of the past because China face an international order that is fundamentally different from those that past rising states confronted. China does not just face the United States; it faces a Western-centered system that is open, integrated, and *rule-based*, with wide and deep political foundations . . . *Today's Western order, in short, is hard to overturn and easy to join*¹ (emphasis added).

In other words, Ikenberry believes that the current international order, which was crafted by the Western countries and is sustained by international rules, is inclusive enough to accommodate China's rise and viable enough to survive China's challenge.

More commentators appear less optimistic, albeit not pessimistic. They tend to take a wait-and-see approach.² For instance, influenced by the English

¹ G. John Ikenberry, The Rise of China and the Future of the West, 87 *Foreign Aff.* 23 (2008) 24.

² Alastair Iain Johnston, Is China a Status Quo Power?, 27 *Int'l Security* 5 (2003); David Scott, *The Chinese Century? The Challenge to Global Order* (New York: Palgrave, 2008); Eva Paus, Penelope B. Prime, and Jon Western eds., *Is China Challenge the Rule of the Game?* (New York: Palgrave, 2009).

School of international society, Buzan, in light of the fact that China has already been substantially integrated into the international society, argued that China's peaceful rise

is possible. But achieving it during the next three decades will be much more difficult than it has been during the past three. To carry on with the successful rise of the last 30 years China needs to think hard both about itself and about the international society in which it is now a major player. This process will inevitably create some tensions, but given that China cannot repeat its experience of the past 30 years such tensions are an unavoidable price of its rise. China has choices about what form these tensions take, and if it plays its hand well, tensions need not be incompatible with peaceful rise.³

Given that China and the rest of the world have extensively interacted with each other, Buzan stressed that China's peaceful rise "cannot be accomplished by China alone, but only by China and the rest of international society working together to create necessary conditions."⁴ This seems to suggest that other countries should take a constructive approach to engage China's rise.

Pessimists are not rare and appear to have increased. As early as 2001, for instance, Mearsheimer, who proclaimed himself an "aggressive realist," warned that China would be "far more powerful and dangerous than any of the potential hegemonies" that the U.S. confronted in the twentieth century.⁵ He was critical of the engagement policy that had persisted for decades in the U.S., which harbored an expectation that China would be integrated into the world economy and transition to democracy so that it would become a partner of the U.S., must be destined to fail.⁶ Mearsheimer predicted that

[i]f China becomes an economic powerhouse it will almost certainly translate its economic might into military might and make a run at dominating Northeast Asia. Whether China is democratic and deeply enmeshed in the global economy or autocratic will have little effect on its behavior, because democracies care about security as much as non-democracies do, and hegemony is the best way for any state to guarantee its own survival. Of course, neither its neighbors nor the United States would stand idly by while China

³ Barry Buzan, *China in International Society: Is "Peaceful Rise" Possible?*, 3 *Chinese J. Int'l Pol.* 5 (2010) 34.

⁴ *Id.*, at 4.

⁵ John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton & Company, 2001) 401.

⁶ *Id.*, at 4.

gained increasing increments of power. Instead, they would seek to contain China, probably trying to form a balancing coalition. The result would be an intense security competition between China and its rivals, with the ever-present danger of great-power war hanging over time. In short, China and the United States are destined to be adversaries as China's power grows.⁷

According to Mearsheimer, nothing but might makes a difference to the rise of China. No international rules can prevent a rising China from seeking hegemony. Fortunately, the U.S. is not too late to return to its realist tradition to contain the rise of China since China at the time of his writing was far from powerful enough to challenge the U.S.⁸ Mearsheimer has no difficulty finding peers in concert with his argument,⁹ intellectual discourse to corroborate his warnings,¹⁰ or historical records in support of his prediction.¹¹

Several events in U.S.-China relations in the past few years, especially those after Donald J. Trump took presidency in 2017, arguably frustrate those optimists while encouraging the pessimists. For instance, the U.S., in its National Security Report of 2017, for the first time identified China as a “revisionist power,” which aims to “challenge American power, influence, and interests, attempting to erode American security and prosperity” and to “shape a world antithetical to U.S. values and interests.”¹² This shift in rhetoric was soon followed by the eruption of a China-U.S. trade war in early 2018, which was considered by China to be the “biggest trade war” in the history.¹³ This trade war, still unfolding, has not only been the most serious economic dispute between the world's largest and second-largest economies in recent history, but it might also be a turning point in the mutual relations between the current most powerful state and another state with the potential to compete for its international leadership. Furthermore, it might start another chapter in the story of the rise and fall of great powers recurring in the past centuries, which often led to the fundamental reconstruction of international relations.

It would be wise to leave to statesmen, diplomats, and international relations scholars the questions of whether China is powerful enough to challenge

⁷ *Id.*, at 4.

⁸ *Id.*, at 402.

⁹ See, e.g., Richard Bernstein and Ross H. Munro, *The Coming Conflict with China* (New York: Vintage Books, 1997).

¹⁰ See Hans J. Morgenthau, *Politics among Nations* (New York: Alfred A. Knopf, 1948).

¹¹ See Paul Kennedy, *The Rise and Fall of the Great Powers* (New York: Random House, 1987); Karen A. Rasler and William R. Thompson, *The Great Powers and Global Struggle 1490–1990* (Kentucky: The University Press of Kentucky, 1994).

¹² White House, National Security Report of the United States, December 2017, at 25, 2.

¹³ Jethro Mullen, “China: The US has started ‘the biggest trade war’ in history,” July 6, 2018: 12:43 AM ET, available at <https://money.cnn.com/2018/07/06/news/economy/us-china-trade-war-tariffs/index.html>.

the U.S. leadership and whether China has any intention of doing so. As an international lawyer, I am obliged to stress a major difference between present battles between China and the U.S. and those that happened among great powers before. That is, international law, which has greatly developed in the last century and especially over the past two decades, has become a focal point of debate with respect to the rise of China among policymakers in China, the U.S., and the rest of the world, and this is an issue which has never existed in the struggles among great powers in the history. It suggests that international law may play a prominent—expected or unexpected—role in the rise of China. One may assume that international law is more effective and legitimate to regulate behaviors of great powers. One could also argue that while international law has become a more efficient instrument to maintain and acquire power than before, it is still not capable of constraining great powers. Importantly, it appears certain that different governments subscribe to different views on the importance and the role of international law and its effects on great powers. For instance, the U.S. complains that international law facilitates China rapidly expanding its power but is of little use in regulating its irresponsible behaviors. By contrast, China is of the view that international law is susceptible to being misused or abused as a legal “weapon” to hinder its rise.

There was a consensus that China used to be highly critical of the international legal order led by the West during the period of the founding of the People’s Republic of China (PRC) in 1949 through the initiation of the Reforming and Opening-up Policy in the late 1970s. During that period, China, as a “revolutionary state,” had little engagement with the international legal order.¹⁴ On the other hand, there was also a consensus that China did not pose a serious threat to the international legal order during this time. As China gradually increased its participation in the international legal order since the late 1970s, however, what China would bring about to the rest of the world emerged as an important concern among international lawyers.

It seems that international lawyers in the early days did not think that China could pose any serious challenge on international legal order, even though it was rhetorically critical of it. In particular, they appeared inclined to assume that China, after it started the Reforming and Opening-up Policy in the late 1970s, would find that it had to yield to and have respect for international law in order to integrate itself in international society and, in particular, to appeal to the Western world. In his renowned 1979 monography *How Nations Behave*, Henkin observed that, even when China was a “revolutionary state,” it did not

¹⁴ See Jerome Alan Cohen and Hungdah Chiu, *People’s China and International Law* (Princeton: Princeton University Press, 1974).

threaten international law. Instead, it “accepted international law in principle.”¹⁵ Henkin explained in length that

[w]hen China decided to emerge on the international scene and strive for influence with governments and with Communist parties, it had to be prepared to play largely by existing rules. It did not seek to destroy or remake international law. Indeed, it invoked international law and acquiesced in its authority, as in its territorial disputes with India. Now, having broken with the Soviet Union, having normalized its relations with the United States, and competing with both for influence among the new nations, China will presumably increase its respect and support for agreed law of nations.¹⁶

A decade later, however, international lawyers were not as confident as before. Some of them were wary that China might not engage the international legal order in a manner that was expected by the Western world. For instance, Feinerman suggested that

China has attempted to accommodate the international community in some areas more than in others; its practice show both admirable compliance with, and complete disregard of, international law; and the future participation of China in the international legal order is certain. Less predictable, particularly with respect to certain subjects, is China’s acceptance of existing standards. Whether the PRC will prove capable of establishing new position and winning over the rest of the international legal community is difficult to assess.¹⁷

In the twenty-first century, the prevalence of pessimistic observations has increased. Some international lawyers are doubtful that international law will be effective in engaging a rising China. For instance, Posner and Yoo, by examining the drawbacks of international institutions including the United Nations (UN), International Court of Justice (ICJ), international human rights systems, the International Tribunal for the Law of the Sea (ITLOS), and the World Trade Organization (WTO), and the U.S. and China’s policies toward these institutions, concluded that international law would not be a reliable tool to manage the mutual relations between the two states and predicted that a new Cold War is most likely to occur between them. Posner and Yoo thus were opposed to a popular argument that

¹⁵ Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 2nd ed., 1979) 110.

¹⁶ *Id.*, at 109–110.

¹⁷ James V. Feinerman, Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?, 1995 *China Q.* 196 (1995) 210.

America should bind itself and the world to strict adherence to international law and international institutions such as the United Nations and the World Court. When America is no longer so mighty, it will be grateful for the protection that these institutions offer to the weak against the strong.¹⁸

More recently, some international lawyers go further and argue that China seeks to entirely reshape the international legal order in its favor as it rises. For instance, Katrin Kinzelbach, after a close scrutiny of China's statements on human rights at the UN (2000–2010), suggested

[i]t is true that the People's Republic of China has so far not provided an alternative normative frame to human rights, nonetheless it would be wrong to conclude that China's diplomacy at the UN does not impact on the international human rights regime . . . This political reality undoubtedly increases China's ability to shape the international human rights discourse . . .¹⁹

More importantly, there appears to have emerged a similar change of perceptions among policymakers in some countries. Taking the international trade regime as an example, the U.S. Trade Representative (USTR), in its latest review on China's WTO compliance, announced that it "erred in supporting China's entry into the WTO."²⁰ The USTR contends that

U.S. policymakers hoped the terms set forth in China's Protocol of Accession would dismantle existing state-led policies and practices that were incompatible with an international trading system expressly based on open, market-oriented policies and rooted in the principle of non-discrimination, market access, reciprocity, fairness and transparency. But those hopes were disappointed. China largely remains a state-led economy today, and the United States and other trading partners continue to encounter serious problems with China's trade regime. Meanwhile, China has used the imprimatur of WTO membership to become a dominant player in international trade.²¹

¹⁸ Eric A. Posner and John Yoo, International Law and the Rise of China, 7 *Chi. J. Int'l L.* 1 (2006–2007) 3, 15.

¹⁹ Katrin Kinzelbach, Will China's Rise Lead to a New Normative Order? An Analysis of China's Statements on Human Rights at the United Nations (2000–2010), 30 *Neth. Q. Hum. Rts.* 299 (2012) 80, 81. See also Björn Ahl, The Rise of China and International Human Rights Law, 37 *Human Rts. Q.* 637 (2015).

²⁰ United States Trade Representative, 2017 Report to Congress on China's WTO Compliance, January 2018, at 2.

²¹ *Id.*

In addition to legal compliance, the U.S. is seriously concerned with China's intention to enhance its norm entrepreneurship. In seeking an approval of Trade Promotion Authority (TPA) in early 2015, then President Barack Obama said:

My top priority as President is making sure more hardworking Americans have a chance to get ahead. That's why we have to make sure the United States—and not countries like China—is the one writing this century's rules for the world's economy . . . Right now, China wants to write the rules for commerce in Asia. If it succeeds, our competitors would be free to ignore basic environmental and labor standards, giving them an unfair advantage over American workers. We can't let that happen. We should write the rules, . . .²²

Furthermore, the U.S. recognizes that there are many loopholes in international law, which reduces the effectiveness and efficiency of international law in managing China's rise. For instance, the U.S. has noted that the WTO rules are insufficient to constrain China's market-distorting behaviors.²³ In light of this, the U.S., Japan, and the European Union (EU) have recently issued a joint statement aimed to develop new trade rules on subsidy, public bodies, state-owned enterprises (SOEs), technology transfer, and, more generally, market-oriented conditions to cope with China.²⁴ Similarly, the EU Commission proposed to negotiate new WTO rules.²⁵ Clearly, these initiatives are targeted against China.

For the part of China, China has become more friendly with international law, recognizing that international law can enhance and justify its rise. According to Wang Yi, China's foreign minister, China has recognized that "in today's world, acting in accordance with international law is the common sense, whereas breaching international law is unpopular."²⁶ China defends itself a "staunch defender and builder" of international rule of law.²⁷ China further promised that "as China grows stronger, it will make greater contribution to the maintenance and promotion of international rule of law."²⁸ In addition to highlighting its good record of compliance with international obligations,

²² President Obama: "Writing the Rules for 21st Century Trade," February 18, 2015, available at <https://obamawhitehouse.archives.gov/blog/2015/02/18/president-obama-writing-rules-21st-century-trade>.

²³ United States Trade Representative, 2017 Report to Congress on China's WTO Compliance, January 2018, at 2.

²⁴ Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, May 3, 2018, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting>.

²⁵ EU Commission, WTO-EU's Proposals on WTO Modernization, Brussels, July 5, 2018.

²⁶ Yi Wang, "China, a Staunch Defender and Builder of International Rule of Law," October 29, 2014, at <http://www.china-un.org/eng/hyyfy/t1205399.htm>.

²⁷ *Id.*

²⁸ *Id.*

China has become more determined to exert greater influence in international law-making by proposing “Chinese wisdom” or “China’s project.”²⁹

On the other hand, partly because of the South China Sea (SCS) arbitration that the Philippines initiated against China in 2013,³⁰ China is also more concerned that international law may become an impediment to its rise. Chinese leaders have repeatedly warned that international law is at a risk of misuse, misinterpretation, or abuse.³¹ As a matter of fact, never have Chinese leaders attached so great importance to international law, even though it might be rhetorical. For instance, China’s President Xi Jinping contended that

[i]n the international society, there should be just one law that applies to all. There is no such law that applies to others but not oneself, or vice versa. There should not be double standards when applying the law. We should jointly uphold the authority and sanctity of international law and the international order. All countries should exercise their rights in accordance with the law, oppose bending international law, and reject any attempt to undermine, in the name of “rule of law”, other countries’ legitimate rights and interests as well as peace and stability.³²

In a nutshell, since China has rapidly expanded its power by, among others, reorienting its traditionally inward-focused international legal policies and practices to around the same time when international law, especially global regimes and institutions, has gained traction in international relations,³³ the relationship between international law and a rising China has unprecedented intellectual and policy importance.

²⁹ See Chapter Four.

³⁰ See Chapter Seven.

³¹ See Xi Jinping, Remarks by H.E. Xi Jinping President of the People’s Republic of China at the Opening Ceremony of the Second World Internet Conference (December 16, 2015), available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1327570.shtml; Xi Jinping, Speech by President Xi Jinping at the United Nations Office at Geneva (January 18, 2017), available at <http://iq.chineseembassy.org/eng/zygx/t1432869.htm>. In all these speeches, President Xi Jinping always warns of the “double standard” application of international law.

³² Xi Jinping, Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World Through Win-Win Cooperation—At Meeting Marking the 60th Anniversary (June 28, 2014) (Speech on the Five Principles of Peaceful Coexistence), available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml (last visited April 25, 2018).

³³ John Garrick and Yan Chang Bennett eds., *China’s Socialist Rule of Law Reforms Under Xi Jinping* (London: Routledge, 2016) xxiii.

2. Research Structure

In addition to the introduction and concluding parts, this book consists of six chapters.

As indicated in the previous research background, international law has become a fundamental concern in the debates surrounding the rise of China among both academics and policymakers. Thus, it is necessary to examine the state of the art of international law first. Chapter Two briefly examines how international law has transformed in terms of community, power, adjudication, and spirit, which has significant implications for the international legal policies and practice of great powers, including China. That chapter then presents a general evaluation of the relevance of international law to the rise of China, leaving more specific issues to be explored in the following chapters.

Of course, to what extent international law matters to the rise of China is substantially influenced by Chinese international legal policies. However, what is China? This is an ostensibly stupid question, but it absolutely is not! China is a country whose identity is most difficult to identify. China's identity not only changes over time, but exhibits multiple dimensions at the same time. Different people may have divergent conceptions of China. According to sociological theories, identity has important impacts on behavior, even though it alone does not necessarily lead to a behavior. Thus, it is highly likely that people will misunderstand Chinese international legal policies and practice if people do not have a proper perception of China's identity. Therefore, Chapter Three, after a brief theoretical discussion on identity, reviews the evolution of China's identity. Then, this chapter investigates how China has framed its international legal policies as its identity changes.

Chapter Four moves to regimes that create international rights and obligations. In domestic society, individuals exercise rights and undertake obligations in accordance with laws enacted by legislatures and any individual does not have power to make law for themselves or for others. In contrast, States in a horizontal international society play dual roles: law user and law maker. As law users, States are obliged to comply with international obligations to which they have given their consent; as law makers, States have the right to legislate themselves. If a State cannot effectively participate in international lawmaking either because it is not capable of doing so or because it is denied the opportunity to do so, it becomes a mere taker and user of international law and thus is disadvantaged in arguing for its own interests. The evidence shows that the history of international law is characterized by a handful of great powers' making law for less powerful States, thereby favoring themselves while disadvantaging less powerful States. As a result, compliance with international law becomes the most salient concern for less powerful countries.

As far as China is concerned, China, like many other developing countries, has long been a user of international law and played a marginal role in international lawmaking. As a result, what China always endeavors to do is to convince the world that it honors international obligations in good faith. Perhaps because of this, China was reluctant to enter into treaties with which it found it could not comply for the time being. However, this has not precluded some other countries from repeatedly blaming China for poorly complying with international commitments. As China rises, China has begun to adopt a distinct legal strategy. In addition to continually defending its good record of compliance, China seeks to enhance its norm entrepreneurship.³⁴ Thus, Chapter Four not only reviews what commitments China has made and how they are implemented but also what commitments China is reluctant to make. More importantly, the chapter devotes itself to further explore how China transforms its legal strategy from law compliance to norm entrepreneurship and whether it can succeed in doing so. For this purpose, this chapter first explores the methodology that China uses to comply with international law and to achieve its norm entrepreneurship and potential development. Then, the chapter investigates several regimes, assessing China's compliance with them and evaluating China's norm entrepreneurship.

As suggested by David Kennedy, the twentieth century was a "move to institutions."³⁵ International institutions are major forums where legal rules are proposed, deliberated, and agreed to. They also often provide mechanisms under which legal rules in force are enforced. Moreover, they often are entrusted or enable themselves some community authority toward their members. This explains why great powers always seek a leading role in international institutions and, if they cannot succeed in doing so, they may choose not to join them or to exit from them. As China rises, it endeavors to seek more say in international institutions. On the other hand, national institutions also matter to international law in terms of both international lawmaking and enforcement. An inspection of national institutions merits special attention for China because China's national governance has unique philosophies, framework, and practice. Therefore Chapter Five examines both how China has engaged international institutions at the international level and how China has organized its national institutions in relation to international law at the national level. However, I will not attempt to provide a full picture of Chinese activities in this regard. Rather, I would like to focus on how China, as a rising great power, leverages institutions to protect its interests and expand its powers. As

³⁴ See Chapter Three.

³⁵ David Kennedy, *The Move to Institutions*, 8 *Cardozo L. Rev.* 841 (1987) 843.

far as international institutions are concerned, this chapter, after a brief analysis on the relationship between great powers and international institutions, proposes a typology of China's approach to international institutions. That is, China may be an outsider, partner, member, and sponsor of international institutions, depending on specific situations. The chapter continues to investigate how China engages a number of international institutions, including the *de jure* and *de facto* privileges that China enjoys, and how these international institutions react to the rise of China. As to China's national institutions, given that Chinese national governance is characterized by unique arrangements between public and private institutions, I distinguish between public institutions and private institutions. Then, I examine respectively how multiple public institutions interact with each other, and how public institutions interact with private institutions.

Chapter Six addresses international law before Chinese courts. Over the past two decades, national courts in many countries have shown increased willingness to apply international law. In particular, they have become more assertive in invoking international law to enhance domestic governance and protect individual rights against public authority. There is a quite different picture in China, however. Since the 1970s, when China embarked on the Reforming and Opening-up Policy, Chinese judiciary has pursued a policy of supporting the national development which is characterized by an emphasis on economic growth and maintenance of strong public authority rather than promotion of social justice and respect for political freedom. As a result, the application of international law in Chinese courts is more strategic. More importantly, since the second ten years of the twenty-first century, Chinese judiciary has taken some noticeable measures that are explicitly designed to enhance China's "power of discourse" in international legal order. This chapter first reviews the implications that domestic courts, by applying international law, bring about on the rule of law at the international level and domestic level. After that, this chapter turns to scrutinize how Chinese courts apply international law, what they contribute to the rise of China through the application of international law, and what factors affect the application of international law in Chinese courts. In addition, this chapter also reviews some other developments, including how Chinese courts are involved in treaty negotiations, justify China's international legal arguments by applying national law, and conduct transnational judicial dialogues.

China used to prefer negotiation and consultation to the settlement of international disputes over third-party adjudication. This penchant has begun to change since the 1990s when international courts and tribunals, including those having compulsory jurisdiction, proliferated, which has substantially judicialized international relations and, especially, constrains the maneuvering

of great powers against less powerful nations. Since an adjudicatory mechanism is often part of a package deal, China, upon acceding to a treaty, cannot but accept the dispute settlement mechanism therein. International adjudication has become a new major challenge for China. Chapter Seven seeks to investigate how China uses international law in the settlement of international disputes. Unlike many other international lawyers, however, I will not describe how China engages international adjudication in a general manner, nor do I intend to analyze what the applicable law is in the settlement of international disputes. Rather, I would like to analyze the lawfare for two of what are probably the most serious disputes for China over the past three decades, namely, the China-Philippines SCS arbitration and the China-U.S. trade war. This unique perspective can illustrate the ways in which China deploys international law and China's capability of deploying international law. It can also clarify how China understands and perceives international law. Moreover, it will show how might and law interact with each other in the rise of China. This chapter begins with developing an analytical framework for lawfare in the settlement of international disputes. It then reviews the evolution of Chinese policies and practices pertaining to international dispute settlement, especially on international adjudication. Based upon the analytical framework of lawfare, this chapter examines in depth how China conducts lawfare in China-Philippines SCS arbitration and China-U.S. trade war.

"American exceptionalism," which is based on American unique religion, ideology, and so on and is sustained by American overwhelming power, aroused much fear among many countries as the Kosovo war led by the U.S. in 1999 and the "war on terrorism" waged by the U.S. in 2001, both of which were arguably considered in grave breach of international law. Many countries were afraid that American exceptionalism would place international order at peril. Thus, several serious concerns may be raised: As China is steadily expanding its power, is "Chinese exceptionalism" possible to emerge? If so, is "Chinese exceptionalism" similar to American exceptionalism? If not, what is "Chinese exceptionalism"? I conclude this book by exploring the issue of "Chinese exceptionalism."

2

The Relevance of International Law

1. Introduction

In the past several centuries, power, especially economic power and military power, has been acknowledged as the most important factor in relations among states. This has caused international law to be created and applied largely in the narrow interests of a handful of great powers at the expense of less powerful states. International law once facilitated and justified the unfettered exercise of force by the great powers, for instance, waging wars and exploiting resources. At the same time, it turned its back on less powerful states and failed to provide them with tools to contest the actions of the great powers. International law, in most cases, could not survive great powers. As a result, international law has failed to maintain peace and security, promote prosperity, and deliver justice. As China rises as a new great power with global interests and influence, several concerns emerge. For instance, is international law relevant to the rise of China? If so, what is its relevance? A more daunting question is whether international law can survive a rising China, or whether China might become a lawless state.

In order to answer these questions, the first thing that we should do, obviously, is examine how international law has changed especially in past several decades and is expected to change in the coming years. The failure to have a proper understanding of the transformation of international law may make other states and China itself misinterpret the role of international law in the rise of China. Misinterpretation will complicate attempts to devise and implement international legal policies in an appropriate way. More seriously, such misinterpretation runs the risk of making *Realpolitik* prevail again in the rise of China, thereby intensifying mistrust, tensions, and confrontations around the world.

For this reason, this chapter, in addition to the introduction and concluding remarks, investigates the transformation of international law in terms of community, power, adjudication or judicialization, and spirit (Section 2). Then, this chapter concisely examines implications of contemporary international law on the rise of China (Section 3), leaving some of the issues presented to be further discussed in the following chapters.

2. How International Law Has Changed

Obviously, it is neither possible nor necessary to describe all of the changes that have happened in the history of international law in this chapter.¹ Rather, given that international law has failed in containing behaviors of great power in history and China is rising as a new great power in this century, I would like to focus on four dimensions of those changes which I think are of significance to the relationship between great powers and international law. The four dimensions include community, power, judicialization, and spirit.

2.1 Community

Any legal order, international and domestic, must exist within a community or society² which evolves over time. There is a legal proverb which states, “without society no law, without law no society.”³ This aphorism implies that the evolution of international community may have implications for the development of international law and vice versa.

¹ See generally Joel P. Trachtman, *The Future of International Law* (Cambridge: Cambridge University Press, 2013).

² Some international law scholars and international relations scholars distinguish “community” from “society,” arguing that, compared with “society,” “community” represents a more advanced group which is bound by more connections, especially value and identity, etc. See, e.g., Georges Abi-Saab, Whither the International Community, 9 *Eur. J. Int’l L.* 248 (1998) 249; Russell Buchan, A Clash of Normativities: International Society and International Community, 10 (1) *Int’l Com. L. Rev.* 3 (2008) 6–21. However, some other international law scholars and international relations scholars only refer to “society” or “community,” or use “community” and “society” interchangeably. In addition, the English School distinguishes “international society” from “international system,” arguing that “an international system may exist that is not an international society. Two or more states, in other words, may be in contact with each other and interact in such a way as to be necessary actors in each other’s calculations without their being conscious of common interests or values, conceiving themselves to be bound by a common set of rules, or co-operating in the working of common institutions.” Hedley Bull, *The Anarchical Society* (New York: Palgrave, 3rd ed., 2002) 13. Bull observed a common feature of historical international societies was “that they were all founded upon a common culture or civilisation, or at least on some of the elements of such a civilisation: a common language, a common epistemology and understanding of the universe, a common religion, a common ethical code, a common aesthetic or artistic tradition.” *Id.* He suggested that such common elements of a common civilization “may make for easier communication and closer awareness and understanding between one state and another, and thus facilitate the definition of common rules and the evolution of common institutions” on the one hand and that “may reinforce the sense of common interests that impels states to accept common rules and institutions with a sense of common values.” *Id.*, at 15. Interestingly, the English School also uses the term “community,” but it did not present a definition. From the perspective of international legal practice, it seems that international legal instruments prefer to the term “community.” Thus, I argue that “community” differs “society” in “degree” instead of “kind.” As a result, I use the term “community,” even though the term “society” is also sometimes used.

³ L. Oppenheim ed., *The Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914) 3.

Any community, although to different degrees, is formed and bound up with connections among its constituents. Therefore, the evolution of community can be examined from two perspectives: connections and members. Obviously, both change over time. Comparatively speaking, connections concern the “quality” (“thin” or “thick”) of community, while constituents concern the “quantity” (small or larger) of community. The more connections that exist, the “thicker” community will be; the more members are included, the larger community will be. Arguably, however, the expansion of community perhaps is achieved at the expense of derogation of solidarity. In other words, the larger international community is, the thinner international community might be.

Since international law originated in Europe, it is necessary to examine community in Europe to understand the beginnings of the evolution of international law. Spiritual connections, especially religion, played a prominent role in the formation of European community. Nearly all forerunners of international law acknowledged that Christianity created European community. For instance, Francisco Suárez suggested that “the human race . . . always preserve a certain unity, not only as a species, but also a moral and political unity (as it were) enjoined by the natural percept of mutual love and mercy . . .”⁴ Similarly, Christian Wolff contended that “Nature itself has established society among all nations and binds them to preserve society . . . for the purpose of promoting the common good by their combined powers.”⁵ Actually, it is widely acknowledged that Christianity was a major source of modern international law.⁶

The devastating Thirty Years War, a result of continually worsening confrontations between Catholics and Protestants, led to the fracturing of the European Christian community, and demonstrated that spiritual connections failed to sustain European community by themselves. The Thirty Years War was ended by the Peace of Westphalia in 1648, which led to the creation of Westphalian treaties of peace.⁷ The Westphalian treaties reconstructed European Christian community by recognizing Protestantism at an international level and allowing about three hundred small member states of the Holy Roman to ally with foreign powers and to wage wars.⁸ European Christian community was thus maintained, but the Pope was no longer one of “two poles of authority” in Europe, the other of which was the Roman Empire.⁹ Hundreds

⁴ Citing from Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *Recueil des Cours* 281(1999) 74.

⁵ *Id.*

⁶ See generally John Eppstein, *The Catholic Tradition of the Law of Nations* (New Jersey: The Lawbook Exchange Ltd., 2008); Esther D. Reed, *Theology for International Law* (London: Bloomsbury, 2013).

⁷ See generally Derek Croxton, *Westphalia: The Last Christian Peace* (New York: Palgrave, 2013).

⁸ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2nd ed., 2005) 24.

⁹ Antonio Cassese, at 23.

of newly emerging secular nations were vested with nearly unlimited sovereign power. Yet, European nations shared a common Christian identity, which permeated almost every aspect of national governance and the lives of people. More importantly, Christian identity helped European nations coordinate with each other to expand, through the colonization of the rest of the world, the new European community to a global community, which was obviously motivated by interests pursuit rather than religion aspiration.

The secularization of European community brought about an important consequence. That is, secular factors, especially the pursuit of economic and political power, became more and more important variables in the evolution of international community while the importance of shared religious identity receded in importance. A Europe-centered community of "interests" thus emerged, erupted, recovered, and expanded in the following three centuries. For instance, those limitations provided in Westphalia treaties, including that European nations shall wage war neither against the Holy Roman Empire nor against "public peace" and Westphalia treaties themselves,¹⁰ were often violated. Conflicts and wars occurred one after the other among European nations in their pursuits of hegemony in Europe, and this finally culminated in the Concert of Europe of 1815.¹¹ The Concert of Europe heralded an era of great powers or "police powers."¹² A handful of great powers were vested with the mandate to maintain peace and security in Europe. While this theoretically covered Europe, since the mid-nineteenth century European great powers, which had rapidly expanded their power as a result of Industrial Revolution, had sped up the colonization of wide areas of Asia and Africa. It should be stressed that Christian civilization was instrumental to justify European colonization. Based upon the idea of Christian civilization, European nations moved to conquer "uncivilized" Asian and African areas, denying that there existed sovereignty in those areas and thereby justifying their colonization. European nations further proclaimed that they had the mandate to "civilize" those areas. Thus, the legal conception and practice of European nations were gradually transplanted in those areas. In brief, most non-European areas were included as second-class members of the Europe-centered international community.

Entering the twentieth century, the connections in the international community have significantly increased, which makes the international community more "thicker." After the successive eruptions of two world wars, which brought

¹⁰ Treaty of Münster, art. 65.

¹¹ See generally René Albrecht-Carrié, *The Concert of Europe* (London: Palgrave Macmillan, 1968); Harold Nicolson, *The Congress of Vienna* (London: Constable & Co. Ltd., 1946).

¹² It was said that the Chaumon Treaty (1814) "marks a key step in the evolution of the distinction between great and small powers." R. T. Klein, *Sovereign Equality among States* (Toronto: University of Toronto Press, 1974) 12.

“untold sorrow to mankind,”¹³ peace and security were identified as the minimum public order not only for those small and weak states but also for those great powers. As a result, the UN Charter has made illegal the use of force and the threat of use of force except for self-defense.¹⁴ More importantly, collective security mechanisms were established both in the League of Nations and the UN on behalf of the international community to prevent and punish those unlawful acts that threatened international peace and security, even though it was not rare that these mechanisms did not live up to the expectations of the international community, especially those of less powerful states. Furthermore, it has been acknowledged that economic development and cooperation became a significant variable in the willingness of members to protect and maintain the peace and security of the international community.¹⁵ This is largely because national economic recessions and the following protectionist international economic policies were major sources of two world wars.¹⁶ As a matter of fact, many international economic regimes and institutions created in the wake of World War II were inspired by these types of political security considerations. Some international institutions, for instance the WTO, proclaim that they can act to bring about an “under-reported” peace benefit.¹⁷ More recently, as globalization, especially economic globalization, continually moves forward, the world has entered a “world risk society.”¹⁸ Many new risks, for instance, terrorism, emerge, expand, and transcend national borders. People, not only in less developed countries but also in the developed world, have begun to recognize that they cannot escape these risks. It has been suggested that globalization expands community interests in terms of scope and content and enhances the solidarity of the international community. Notwithstanding this, it is not rare that community interests are sought to be individualized by some states in their own narrow self-interest. Thus, international community is sometimes considered “illusory,” and thus it is argued that a State should base foreign affairs on the “firm ground of the national interests.”¹⁹

The emergence of more community interest with global importance has profound implications on the development of international law and vice versa. Bruno Simma suggested that, as a broad community interest developed, international law has gradually moved from the traditional “bilateralist” paradigm,

¹³ UN Charter, art. 1(1) and Preamble.

¹⁴ UN Charter, art. 1(4) and art. 51.

¹⁵ See Covenant of the League of Nations, art. 23; Charter of United Nations, art. 1(3), Chapter X.

¹⁶ “9 The WTO can . . . contribute to peace and stability,” available at https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm.

¹⁷ *Id.*

¹⁸ See generally Ulrich Beck, *World Risk Society* (Cambridge: Polity Press, 3rd ed., 1999).

¹⁹ Condoleezza Rice, Promoting the National Interests, 79 *Foreign Aff.* 45 (2000).

which was based on the narrow interest calculation of individual states, towards “greater solidarity.”²⁰ Over time, more community obligations and community rights have been considered and created, even though they are still relatively rare and because their enforcement is often unreliable.²¹ It is believed that the emergence of more community interest will continually prompt new international legal regimes and institutions and strengthen those regimes and institutions that have existed.

As suggested earlier, international community initially referred to community of European countries. As European powers colonized, and forcefully imposed their civilization on, the rest of the world, a nearly “universal” international community emerged among these nations in the early twentieth century, but those nations in Africa, Asia, and Latin America were degraded as second-class members in international community for a long period. Of course, as Article 2(1) of the UN Charter solemnly provided the principle of equality of sovereignty,²² all members of international community shall be legally equal.

The expansion of international community contributes to the universality of international law. Such a universality not only means international law should apply to all states, including that all states should be entitled to benefit from international law and all states should be obliged to respect for international law. It is also assumed to refer to “a single common legal global world order.”²³ In other words, the universality of international law was assumed to pursue uniform principles, rules, and standards and the uniform application of them. Since the creation and application of international law was dominated by a handful of Western powers in the history, those “single common” principles, rules, and standards were accordingly decided by Western powers.

The expansion of international community may also decrease the efficiency of international legal process, although such a consequence is not necessarily bad. Take the WTO as an example. When the GATT was created in 1948, it had no more than two dozen contracting parties. Major trading powers, especially the U.S., had an almost unfettered ability to exercise their overwhelming power. This may partly explain why the GATT was succeeded by several rounds of trade negotiations within a few years: Geneva Round, one year (1947); Annecy Round, one year (1949); Tokyo Round, two years (1950–1951); Geneva Round,

²⁰ Bruno Simma, From Bilateralism to Community Interest in International Law, 250 *Recueil des Cours* 217 (1994) 229.

²¹ Antonio Cassese, at 15–21. See generally James Crawford, Multilateral Rights and Obligations in International Law, 319 *Recueil des Cours* 333 (2006).

²² Article 2(1) provides that the UN “is based on the principle of the sovereignty equality of all its members.”

²³ Thilo Marauhn and Heinhard Steiger eds., *Universality and Continuity in International Law* (Portland: Eleven International Publishing, 2011) 14.

one year (1956); Dillon Round, two years (1960–1961); Kennedy Round, three years (1964–1967).²⁴ After the mid-1960s, the GATT contracting parties expanded significantly.²⁵ As a result, it took six years and eight years to complete the negotiations of Tokyo Round (1973–1979) and Uruguay Round (1986–1994), respectively. When China was admitted to the WTO in 2001, the WTO had 142 members. As of December 2018, the WTO Members has reached 164. Obviously, it is much more difficult than before to reach any deal among such a large number of WTO Members. Therefore, it comes as no surprise that multilateral trade negotiations have only achieved moderate progress since the Doha Round of negotiations was launched in 2001. As a result, more and more states turn to regional trade agreements. These agreements only involve several contracting parties and thus are more likely to be concluded in a relatively short period.

The existence of the international community does not mean that there are no factual divergences among states. Instead, no one deny that states differ in terms of religion, ideology, and so on. However, the pursuit of the universality of international law demonstrates that international law has paid little regard to factual divergences among states. A major reason obviously is that those states from Africa, Asia, and Latin America were not powerful enough to legally defend their diversity and to challenge the universality of international law. This situation was substantially changed by the emergence of the socialist camp. Indeed, socialist countries and capitalist countries shared many common interests, especially in international peace and security, which made the birth of the UN possible. However, socialist countries do embrace an ideology and a political philosophy squarely at odds with those upheld by Western countries.²⁶ Different from other socialist countries, including China which was far less powerful, the Union of Soviet Socialist Republics (USSR, or the Soviet Union), as a leading socialist country and great power after the World War II, was once so powerful and ambitious as to reconstruct the world order dominated by Western powers for centuries. As a result, the world experienced several decades of Cold War shortly after the end of World War II. Socialist states fiercely assaulted the conception of the universality of international law by developing socialist theory and practice of international law.²⁷ International law thus tends to be plural.

²⁴ "GATT bilateral negotiating material by Round," available at https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm.

²⁵ "The 128 countries that had signed GATT by 1994," available at https://www.wto.org/english/thewto_e/gattmem_e.htm.

²⁶ Antonio Cassese, at 35.

²⁷ See generally Kazimierz Grzybowski, *Soviet Public International Law* (Leyden: A.W. Sijthoff, 1970).

Although the Soviet Union and the socialist camp disappeared, it raised a currently unresolved issue, that is, how does international law accommodate diversities in a universal international community?

2.2 Power

It can be argued that power is indispensable for organizing and running any group. However, power plays a far more prominent role in a horizontal, less organized international society than in domestic society. How international power dynamics change has always been a focus for policymakers and academics.²⁸ Power is the first and foremost factor and perspective that is examined to explain whether international law makes a difference, what it brings about, and how it functions and evolves.²⁹

For most of the time since modern international law was created, no single country was so powerful as to subject all others to its will. The rule was that a few great powers coexisted in international society, and they interacted with each other. For most of the nineteenth century, for instance, Austria, Russia, the U.K., and Prussia were admitted as major great powers. They organized themselves as the “Holy Alliance” and dominated international relations, especially public affairs in Europe. In the twentieth century, however, the structure of international power was significantly transformed. First, international power was largely polarized in the first two decades following World War II. The Soviet Union and the U.S. emerged as two superpowers, which brought international relations into an era of “two polarities. However, the U.S. did not acquire overwhelming power over the Soviet Union, and vice versa. Thus, they often struggled with each other, relying upon “blocs”—socialist bloc and capitalist bloc—which they led respectively. Second, as countries like Japan and the European Community as a whole rapidly expanded their power (mainly economic power), the era of “two polarities” gradually moved toward the era of “multi-polarities” and has done so since the 1980s. Third, when the Soviet Union collapsed in the late 1980s followed by the dismantlement of socialist bloc, the U.S. became “the first and the only truly global power,”³⁰ although it seems that the “American Century” was short-lived.³¹

²⁸ See, e.g., Paul Kennedy, *The Rise and Fall of the Great Powers* (New York: Random House, 1987); Hans J. Morgenthau, *Politics among Nations* (New York: A.A. Knopf, 1948).

²⁹ See, e.g., Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) 5–9.

³⁰ Zbigniew Brzezinski, *The Grand Chessboard: American Primacy and its Geostrategic Imperatives* (New York: Basic Books, 1997) Chapter 1.

³¹ See generally David S. Mason, *The End of the American Century* (Boston: Rowman & Littlefield, 2008).

After this brief concentration, international power continues to disperse in this century. Traditional great powers, including the U.S., decline, and new great powers such as China rise. It should be noted, however, that the ongoing rise and fall of great powers appears to only occur in a relative manner. This situation is preliminarily evidenced by the fact that, although China and several other new great powers might significantly expand their power, they cannot become dominant states in the foreseeable future; traditional great powers like the U.S. might relatively fall, but they still remain key players in international relations. A trend that is more likely to emerge is that we might not live with one or two superpowers again, and neither might there be only several great powers. Rather, there are many “power hubs” in international society.³² Therefore, the world is less likely to repeat the old stories of the rise and fall of great powers, which Schwarzenberger described as the recurring change of constituents of “international oligarchy.”³³

International power not only disperses among states, however. Nonstate actors have also acquired power especially since the second half of twentieth century. This term “nonstate actors” refers primarily to the international institutions which have permeated almost all aspects of international relations and even domestic governance.³⁴ However other private actors, especially transnational corporations, have also rapidly expanded their power and have become influential actors in international relations. They exercise their power in fields ranging from “low politics” to “high politics,” including trade,³⁵ development,³⁶ cybersecurity,³⁷ and military activities.³⁸ Public authority, once monopolized by governments, has been partly transferred to private actors, and thus public governance has been partly privatized.³⁹ As suggested later in this book,⁴⁰ the relationship between private actors and nation states is complicated. They can cooperate and coordinate with each other while at the same

³² See William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 *Harv. Int'l L.J.* 1 (2015).

³³ Georg Schwarzenberger, *Power Politics: A Study of International Society* (Frederick A. Praeger, Inc., 1951) 117–120.

³⁴ See in detail Chapter Five, Section 1.

³⁵ See Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003).

³⁶ Benedicte Bull and Desmond McNeill eds., *Development Issues in Global Governance: Public-Private Partnerships and Market Multilateralism* (London: Routledge, 2006).

³⁷ See Kristen E. Eichensehr, *Public-Private Cybersecurity*, 95 *Tex. L. Rev.* 467 (2016–2017).

³⁸ Antenor Hallo De Wolf, *Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 *Ind. J. Global Legal Stud.* 315 (2006).

³⁹ See generally James N. Rosenau and Ernst-Otto Czempiel eds., *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992); Rodney Bruce Hall and Thomas J. Biersteker eds., *Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

⁴⁰ See in detail Chapter Five.

time conflict with each other. This means that private actors may help a state to expand and exercise its power while they may also impose constraints on the exercise of power by a state.

For centuries, the economic and military power of states had attracted nearly all attention in international relations. As Paul Kennedy observed, economic power, which sustains the expansion of military power, is decisive in the rise and fall of great powers in the long run.⁴¹ However, according to Hedley Bull, in the end, strong military power is indispensable for a great power. Bull thus suggested that Japan could not rely on its economic success to acquire the status of great power.⁴²

Given the rapid growth economic power of Japan and European Community in the 1980s, many observers acknowledged that American “hard power” would inevitably decline. Furthermore, they were aware of the potentially tremendous costs and risks of employing economic and military power in a world of growing interdependence. Thus, Joseph Nye coined a term “soft power,” which referred to “the ability of a country to structure a situation so that other countries develop preferences or define their interests in ways consistent with its own.”⁴³ Soft power tends to “arise from such resources as cultural and ideological attraction as well as rules and institutions of international regimes.”⁴⁴ According to Nye, although the U.S. may decline relatively in terms of hard power, it maintains its preeminence in terms of soft power, which can sustain the U.S. as the most powerful state.⁴⁵ However, some of the soft power that a state has, its leadership in an international organization, for instance, clearly arises from and is sustained by hard power. In other words, hard power is still the base of power of a state as a whole. Furthermore, Nye, being aware of the inability for soft power alone to work effectively in foreign policy, coined the term “smart power” in 2003. Smart power refers to the ability to combine hard power with soft power.⁴⁶ The approach of smart power gained prominence in American foreign policy during the Obama administration.⁴⁷ Moreover, as also happens to hard power, soft power may gradually disperse over time. Some commentators have been concerned that, in addition to the relative decline of hard power, American soft power is also likely to decline.⁴⁸

⁴¹ Paul Kennedy, at xv.

⁴² Hedley Bull, at 200–229.

⁴³ Joseph S. Nye, *Soft Power*, 80 *Foreign Pol’y* 153 (1990) 168.

⁴⁴ *Id.*

⁴⁵ See generally Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).

⁴⁶ Joseph S. Nye, *id.*, at 32; Joseph S. Nye, *Getting Smart*, 88 *Foreign Aff.* 160 (2009) 162.

⁴⁷ “Secretary of State Hillary Clinton Discusses Smart Power,” available at <https://www.youtube.com/watch?v=f1RAQuPxn8I>.

⁴⁸ Joseph S. Nye, *The Decline of America’s Soft Power: Why Washington Should Worry*, 83 *Foreign Aff.* 16 (2004).

Because of a huge disparity of power between states, a crucial concern for the less powerful states that account for an overwhelming majority in international society is the regular abuses and defiance of international law. For instance, after the U.S. became the sole superpower after the collapse of the Soviet Union and socialist bloc, many people were concerned that international law would lose its importance in constraining great powers,⁴⁹ and the U.S. position as the sole superpower would lead to “fundamental change in the international legal system.”⁵⁰ Thus, another crucial concern for those less powerful states is how to improve international law so that it can make a real difference in constraining great powers. One of the major achievements, obviously, is that the equality of sovereignty was for the first time solemnly enshrined in Article 2(1) of the UN Charter. The principle of sovereign equality is defined as all states having “equal rights and duties and [being] equal members of the international community, notwithstanding differences of an economic, social, political or other nature.”⁵¹

Among these ongoing concerns, today the world faces a new challenge. That is, what will the decentralization of power, rather than the concentration of international power, bring to international law? It is too early to draw conclusive conclusions, but it still is helpful to present two tentative observations.

First, international law is now tending to be more plural and fragmented. As the result of this power dispersal, universal international law, which not only has been pursued and sustained by the concentration of power but also appears to have been taken for granted for centuries, may to some extent lose its momentum and attraction. As a matter of fact, the fragmentation of international law has become a systematic concern. In April 2006, the UN International Law Commission (ILC) adopted an important report to describe this trend.⁵² The regionalism that exists within the WTO system is one of the major fragmentations of international law.⁵³ It should be stressed that the recent trend of trade regionalism was mainly initiated by the U.S., which was a

⁴⁹ Detlev F. Vagts, *Hegemonic International Law*, 95 *Am. J. Int'l L.* 843 (2001).

⁵⁰ Michael Byers and George Nolte eds., *United States Hegemony and the Foundation of International Law* (Cambridge: Cambridge University Press, 2003) XV.

⁵¹ In particular, sovereign equality includes the following elements: (a) states are judicially equal; (b) each state enjoys the rights inherent in full sovereignty; (c) each state has the duty to respect the personality of other states; (d) the territorial integrity and political independence of the state are inviolable; (e) each state has the right freely to choose and develop its political, social, economic, and cultural systems; (f) each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/25/2625, October 24, 1970.

⁵² Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (hereinafter “Report of the Fragmentation”), Report of the Study Group of the International Law Commission, A/CN.4/L.682, April 13, 2006.

⁵³ Report of the Fragmentation, Part C (5).

major sponsor of multilateral trade system in the 1940s and a major defender of that system in the following several decades. As of December 2018, the U.S. has twenty free trade agreements (FTAs) in force, fourteen out of which were concluded after 2004.⁵⁴ The Obama administration also signed the Trans-Pacific Partnership (TPP) in February 2016, but the Trump administration exited in January 2017. However, it has been reported that President Trump considered the possibility of rejoining the TPP.⁵⁵ The U.S. is also in negotiations regarding the Transatlantic Trade and Investment Partnership (TTIP) with the EU.⁵⁶ Other great powers are following this trend. For instance, as a leading advocate of multilateralism, India also turns to embrace the FTA approach.⁵⁷ By May 2019, India had concluded more than two dozen FTAs, and many more FTAs are under negotiations and considerations.⁵⁸

The ILC acknowledges that the fragmentation of international law may bring about difficulties, but it treats it overall as a neutral trend. The trend has both positive and negative sides.⁵⁹ On the one hand the decentralization of power, especially the rise of new great powers including China, may be helpful to address long-standing injustices of international law, including the “development deficit” and “democracy deficit.” New great powers arguably are better positioned to improve international law. However, this is arguably not because new great powers are necessarily endowed with some nobler morality than old great powers, but rather because they, as developing states that have long been disadvantaged in international law, can generally be more sensitive to the situations of other developing states.⁶⁰ On the other hand, these new great powers, like old great powers, also conduct foreign affairs based on their own national interest and thereby seek to expand their power. Thus, it comes as no surprise that new great powers including China may often treat international law as old great powers have done.⁶¹

A second but no less important observation is that less powerful states will play a more important role in international law than before. Given the historic huge power disparities between a handful of great powers and less powerful

⁵⁴ “Free Trade Agreements,” at <https://ustr.gov/trade-agreements/free-trade-agreements>.

⁵⁵ Ana Swanson, “Trump Proposes Rejoining Trans-Pacific Partnership” (April 12, 2018), at <https://www.nytimes.com/2018/04/12/us/politics/trump-trans-pacific-partnership.html>.

⁵⁶ USTR, “Free Trade Agreement,” available at <http://www.ustr.gov/trade-agreements/free-trade-agreements>.

⁵⁷ WTO Trade Policy Review, Trade Policy Report by India, WT/TPR/G/182, April 18, 2007, paras. 166–171.

⁵⁸ Ministry of Commerce and Industry of India, “Trade Agreements,” available at <https://commerce.gov.in/InnerContent.aspx?Type=InternationalTrademenu&Id=32>.

⁵⁹ Report of the Fragmentation, para. 14.

⁶⁰ Congyan Cai, New Great Powers and International Law in the 21st Century, 24 *Eur. J. Int'l L.* (2013) 775–783.

⁶¹ *Id.*, at 760–761, 767–768.

states, international law-creation and enforcement were dominated by great powers for centuries. The role of less powerful states in international legal order is still minor. However, once the principle of sovereign equality was enshrined in the UN Charter these nations gained a tool to increase the voice of less powerful states in international law. Unfortunately, the huge power disparity with great powers often prevents most less powerful states from meaningfully arguing for their legal arguments and defending their state interests. As the power disparity with great powers tends to reduce, however, less powerful states, individually or collectively, exercise their powers,⁶² which is helpful to increase their voice in international law. As a matter of fact, many less powerful states were active in the negotiations of, for example, the Universal Declaration of Human Rights, the Rome Statue of the International Criminal Court, climate change treaties, and WTO disputes settlement mechanism reform.⁶³ By examining several important cases, for instance, the Mine Ban Treaty (1997), Bower documented a phenomenon of “norms without the great powers.”⁶⁴ A development in this vein is the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW). While neither permanent member states of the UN Security Council nor nuclear powers supported the negotiations and conclusion of the treaty, the treaty was adopted with the approval of 122 states at the UN General Assembly in July 2017. As of December 2018, the treaty has been signed by sixty-nine states with ratifications of nineteen states.⁶⁵ Although many less powerful states remain disadvantaged in the international legal order,⁶⁶ it is believed that they will continually increase their importance in international law. Accordingly, great powers may find that they are more and more unable to unilaterally exert their power and thereby have to make compromises with less powerful states.

⁶² See generally Erich Reiter and Heinz Gärtner eds., *Small States and Alliances* (Heidelberg: Springer, 2001); Andrew F. Cooper and Timothy M. Shaw eds., *The Diplomacies of Small States* (New York: Palgrave, 2009); Jacqueline Anne Braveboy-Wagner, *Small States in Global Affairs* (New York: Palgrave, 2008).

⁶³ Susan Waltz, Universalizing Human Rights: The Role of Small States in the Construction of Universal Declaration of Human Rights, 23 *Hum. Rts. Q.* 44 (2001); Delia Chatoor, The Role of Small States in International Diplomacy: CARICOM's Experience in the Negotiations on the Rome Statue of the International Criminal Court, 7 *Int'l Peacekeeping* 295 (2001); Daniel Brindis, What Next for the Alliance of Small Island States in the Climate Change Arena?, 7 *Sustainable Dev. L. & Pol'y* 45 (2008); Andrea M. Ewart, Small Developing Countries in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement, 35 *Syracuse J. Int'l L. & Com.* 27 (2007–2008).

⁶⁴ Adam Bower, *Norms without the Great Powers* (Oxford: Oxford University Press, 2017).

⁶⁵ “Status of the Treaty,” available at <http://disarmament.un.org/treaties/t/tpnw>.

⁶⁶ See, e.g., Roman Grynberg ed., *WTO at the Margins: Small States and the Multilateral Trading System* (Cambridge: Cambridge University Press, 2006).

2.3. Adjudication

It has long been assumed that international law merely represents a primitive legal order.⁶⁷ This argument is mainly based on the absence of robust adjudicatory systems in international law.⁶⁸ Indeed third-party adjudications were not rare in the eighteenth and nineteenth century. However, they were not based on compulsory but voluntary jurisdiction. In other words, a disputing state had the freedom to decide whether a dispute would be submitted for determination by a third party after it occurred. Understandably, a disputing state would be reluctant to do so if it felt the result would not be in its favor. Several proposals to establish international courts with compulsory jurisdiction were raised, but they ultimately failed.⁶⁹ As a result, international rights and obligations often fail to be interpreted and decided in an impartial manner.

Since the twentieth century, however, international adjudication with more or less compulsory jurisdiction emerged. The first important one was the Permanent Court of International Justice (PCIJ). The PCIJ, in accordance with Article 36 (2) of the PCIJ Statute, known as the “optional clause,” had the power to exercise compulsory jurisdiction over four classes of disputes.⁷⁰ By the end of 1939, forty out of the fifty-two member states of the League of Nations had accepted the optional clause. More importantly, the PCIJ procedure was frequently used. Between 1922 and 1940 the PCIJ dealt with twenty-nine contentious cases and delivered twenty-seven advisory opinions.⁷¹ The International Court of Justice (ICJ) Statute includes an “optional clause” identical to that in the PCIJ Statute.⁷² However the “optional clause” of the ICJ Statute appears far less attractive. As of January 2018, it has been accepted by only 73 out of all 193 UN Members States. Furthermore, the ICJ was less frequently used than its predecessor for a long period. From 1946 to 1989, the ICJ exercised jurisdiction—including contentious and advisory jurisdiction only seventy-four times.⁷³ However, the caseload of the ICJ has significantly increased since the 1990s. From 1991 to 2018, eighty-one cases were brought before the ICJ.⁷⁴

⁶⁷ John Austin regarded international law as “positive morality” only. John Austin, *The Province of Jurisprudence Determined* (ed. H. L. A. Hart) (London: John Murray, 1954) 133–142.

⁶⁸ See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1964) Chapter Ten.

⁶⁹ Cesare P. R. Romano, Karen J. Alter, and Yuval Shany eds., *The Oxford University of International Adjudication* (Oxford: Oxford University Press, 2014) 42–53.

⁷⁰ They included legal disputes concerning (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; (4) the nature and extent of the reparation to be made for the breach of an international obligation. Art. 36 (2).

⁷¹ “History,” available at <http://www.icj-cij.org/en/pcij>.

⁷² ICJ Statute, art. 36(2).

⁷³ “List of all cases,” available at <http://www.icj-cij.org/en/list-of-all-cases>.

⁷⁴ *Id.*

International courts with compulsory jurisdiction, permanent or ad hoc, have boomed since the 1990s. This trend is often referred to as the “proliferation” of international adjudication.⁷⁵ There currently exist about two dozen permanent international courts, including the Dispute Settlement Body (DSB) of the WTO and the International Tribunal for the Law of the Sea (ITLOS) under the UN Convention on the Law of the Sea (UNCLOS).⁷⁶ Most international courts are ad hoc, for instance, investor-state investment tribunals established in accordance with investment treaties. The body of international judicial cases has been dramatically expanding. For instance, since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.⁷⁷ The DSB is widely regarded as the “jewel of the crown” of the WTO.⁷⁸ As of July 31, 2017, the total number of publicly known investor-state investment claims had reached 817, most of which have occurred since the 1990s, and 114 countries have been respondents to one or more known claims of this kind.⁷⁹

As international courts rapidly increase and the body of judicial cases dramatically expands, the performance of international courts has become a crucial concern.⁸⁰ Obviously, compliance with decisions by international courts is one of most important—if not the most important—indexes to assess the performance of international courts. If the losing parties to disputes totally reject or do not properly comply with decisions unfavorable to them, the effectiveness of international adjudication is obviously seriously damaged. Fortunately, the record of compliance of international adjudicatory decisions appears good, even though it is not easy to establish objective measures for compliance.⁸¹ It is not rare, however, that decisions of international courts are openly defied. Unfortunately, international courts are not well equipped to ensure compliance.⁸² As a matter of fact, compliance is often influenced by *Realpolitik*. *Case*

⁷⁵ Cesare P. R. Romano, Karen J. Alter, and Yuval Shany eds., at 136–137.

⁷⁶ Cesare P. R. Romano, Karen J. Alter, and Yuval Shany eds., at 63–90.

⁷⁷ “Dispute Settlement,” available at https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

⁷⁸ “WTO disputes reach 400 mark,” available at https://www.wto.org/english/news_e/pres09_e/pr578_e.htm.

⁷⁹ UNCTAD, Special Update on Investor-State Dispute Settlement: Facts and Figures, November 2017, at 2.

⁸⁰ See generally Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014); Theresa Squatrito, Oran R. Young, Andreas Follesdal, and Geir Ulfstein eds., *The Performance of International Courts and Tribunals* (Cambridge: Cambridge University Press, 2018).

⁸¹ See Cesare P. R. Romano, Karen J. Alter, and Yuval Shany eds., at 437–463; Eric A. Posner, *The Perils of Global Legalism* (Chicago: The University of Chicago Press, 2009) 142–143; Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2004) 436–437.

⁸² For instance, Article 94 (1) of the UN Charter provides: “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse of the Security Council, which may, if it deems necessary, make recommendation or decided upon measure to be taken to give effect to the judgment.”

Concerning Military and Paramilitary Activities in and against Nicaragua is arguably a “turning point” in this regard.⁸³ In 1984, the ICJ decided to hear the dispute arising from military and paramilitary activities that the U.S. conducted in and against Nicaragua, rejecting the argument by the U.S. that the ICJ did not have jurisdiction over that dispute.⁸⁴ Although the U.S. participated in the jurisdiction phrase, it was absent at the merit phrase. In 1986, the ICJ finally determined that the U.S. violated its international obligations toward Nicaragua.⁸⁵ Nicaragua sought to enforce the ICJ judgment through bilateral negotiations firstly with the U.S. and then through recourse to the UN Security Council and General Assembly. All those efforts failed because, for instance, the U.S. was able to block any related proposals in the UN Security Council. In December 1991, Nicaragua announced that it decided to renounce any rights against the U.S. as determined in ICJ judgment since the two had reached an agreement with Nicaragua to support Nicaragua’s economic, commercial, and technical development. Accordingly, that case was removed by the ICJ.⁸⁶ When the U.S. declined to comply with the ICJ judgment, it surely damaged the ICJ’s authority, but that judgment was still far from meaningless. The U.S. incurred a huge reputation loss for its defiance.⁸⁷ As noted earlier, the U.S. presumably provided substantial assistance in return for Nicaragua’s discontinuance to seek the compliance of the ICJ judgment.

International adjudication enhances the depoliticization of international relations, representing important progress in the movement of international relations “from force to diplomacy, from diplomacy to law.”⁸⁸ In particular, it provides less powerful states with legal means to challenge the might of great powers on equal footing. Arguably, nearly all less powerful countries have welcomed the trend of adjudication of international law. For instance, the U.S. has often been brought before the ICJ by less powerful countries like Switzerland, Nicaragua, Libya, Paraguay, and Iran,⁸⁹ even after the U.S. terminated its acceptance of Article 36 (2) of the ICJ Statute on October 7, 1985. For instance, in 1991, Libya brought the U.S. before the ICJ, accusing

⁸³ Constanze Schulte, at 403.

⁸⁴ Case Concerning Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984.

⁸⁵ Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merit, Judgment of 27 June 1986.

⁸⁶ Constanze Schulte, at 197–207.

⁸⁷ Although the U.S. within the UN Security Council vetoed the resolution drafts requiring it to comply the ICJ judgment, Nicaragua got supports from a majority of Security Council Members. Terry D. Gill, *Litigation Strategy at the International Court* (Dordrecht: Martinus Nijhoff Publishers, 1989) 286.

⁸⁸ Louis Henkin, at 1.

⁸⁹ Eric A. Posner, *The Perils of Global Legalism* (Chicago: The University of Chicago Press, 2009) 139.

the U.S. of breaching Articles 5, 7, 8, and 11 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.⁹⁰

Compared with those less powerful countries, great powers are more ambivalent in their feelings regarding international adjudication. On the one hand, they are major advocates and customers of international adjudication. For instance, as of December 2018, the U.S. has brought 131 disputes and has had 159 cases filed on its behalf before the DSB, making it both the largest complainant and respondent among all 164 WTO Members.⁹¹ On the other hand, they may also be reluctant to subject themselves to international courts. For instance, after *Nuclear Tests (Australia v. France; New Zealand v. France)*, which forced France to announce that it no longer carried out new atmospheric nuclear tests,⁹² France withdrew its acceptance of Article 36 (2) of the ICJ Statute in 1974. Similarly, during the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, the U.S. declared in October 1985 that it no longer accepted the compulsory jurisdiction of the ICJ under Article 36(2) of the ICJ Statute. Today, among all five permanent members of the UN Security Council, the U.K. is the sole one that is subject to ICJ compulsory jurisdiction.

It has begun to be recognized, however, that the judicialization of international law represents a “mixed blessing.”⁹³ As growing international courts have become more active in exercising their judicial power, a serious concern emerges regarding whether the judicial power is duly exercised by international judges. For instance, do they properly interpret international law? Do they, in addition to the determination of international rights and obligation, act *ultra vires* as lawmakers to create international rights and obligations? Are their capability and impartiality reliable? A full exploration of these issues is obviously beyond the reach of this book,⁹⁴ but it is widely recognized that international adjudicatory mechanisms are not perfect tools to deliver justice. Therefore, they need to be improved. Otherwise they will lose their attractiveness to parties to disputes. As a matter of fact, many reformative measures have been put into place or are under consideration to improve international adjudicatory

⁹⁰ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I. C. J. Reports 1998, at 115.

⁹¹ “Disputes by member,” available at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

⁹² Nuclear Tests Case (Australia v. France), Judgment of 20 December 1974; Nuclear Tests Case (New Zealand v. France), Judgment of 20 December 1974.

⁹³ See generally Andreas Follesdal and Geir Ulfstein eds., *The Judicialization of International* (Oxford: Oxford University Press, 2018).

⁹⁴ See generally Gleider Hernández, *The International Court of Justice and the Judicial Function* (Oxford: Oxford University Press, 2014); Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014); Jason Webb Yakee, Controlling the International Investment Law Agency, 53 *Harv. Int’l L.J.* 391 (2012).

mechanisms. Take the investor-state investment arbitration as an example. Some newly concluded investment treaties include more requirements concerning the professional capability and code of conduct of international arbitrators, more transparency in arbitration proceedings, more room for intervention by contracting parties in the dispute settlement, and the potential for arbitral appellate or investment courts.⁹⁵ Similarly, in September 2018 the ICJ decided to adjust its policy as to the participation of its members in international arbitration proceedings. That is, the ICJ judges, generally speaking, no longer participate in investor-state arbitration or commercial arbitration. If a state calls an ICJ judge to do so, a prior authorization from the ICJ is needed. In any event, an ICJ judge will decline to be appointed an arbitrator by a state that is a party in a case pending before the ICJ in order to “place beyond reproach the impartiality and independence of Judges in the exercise of their judicial functions.”⁹⁶

2.4 Spirit

Inspired by the *Spirit of the Laws* by Charles Louis Montesquieu, Bederman sought to find by examining the spirit of international law why many people in practice were and are skeptical of international law when it is “so historically legitimate and ethically relevant, so doctrinally robust and functionally necessary.”⁹⁷ Compared with Bederman, who engaged more with specific issues, for instance, the sources, subjects, and objects of international law, I would like to do so in a more general manner. For me, the evolution of the spirit of international law is characterized by the effectiveness, legality, and rule of law.

As Antonio Cassese suggested, international law was long based on the principle of effectiveness. The effectiveness derives from the enduring authority, which mainly is sustained by power and force. Where there is effectiveness, there are the rights and obligations for a specific claim or situation. On the other hand, where there is no longer effectiveness, there is no basis for claiming the rights and obligations which are supposed to have existed.⁹⁸ Thus, it comes as no surprise that international law traditionally subjected itself to *Realpolitik*.

⁹⁵ See, e.g., EU-Vietnam FTA, Chapter 8, Section 3, Arts. 12 (tribunal), 13 (appeal tribunal), 14 (ethics); 2012 U.S. Model BIT, Arts. 28 (conduct of the arbitration); 29 (transparency of arbitral proceedings).

⁹⁶ Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-third Session of the United Nations General Assembly (October 25, 2018), at 12.

⁹⁷ David J. Bederman, *The Spirit of International Law* (Athens: University of Georgia Press, 2002) 1.

⁹⁸ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2nd ed., 2005) 12–13.

More specifically, it was instrumentalized to encourage and justify great powers to abuse their power. The situation began to change after the World War II; the “legality” approach was developed to replace sheer force as a legitimate authority.⁹⁹ Any rights and obligations, in accordance with the legality approach, arise from international law instead of force or authority. If there is no consent given by states, there are no international legal rights and obligations. Except for the very limited exceptions of *jus cogens* or peremptory norms,¹⁰⁰ no international obligations can be imposed upon a state against its will. For instance, in 1931, the Japanese army launched military operations against the Chinese army in Manchuria, asserting that Japanese military facilities and soldiers were attacked. However, Japan never admitted that it occupied or had the intention of occupying Manchuria. The main reason was that both Japan and China were contracting parties to the General Treaty for the Renunciation of War (1928). Because of these international constraints, Japan sought to occupy Manchuria by supporting the establishment of the State of Manchuria, which was a puppet totally under Japanese control. Nevertheless, then U.S. Secretary of State Henry L. Stimson, on behalf of the American government, issued a diplomatic note to both the Japanese government and the Chinese government, declaring that the U.S. “could not admit the legality of any situation *de facto*, . . . which may impair . . . including those which relate to sovereignty, independence, or territorial and administrative integrity of the Republic of China” and that the U.S. “does not intend to recognize any situation, treaty or agreement which may be brought about any means contrary to . . . the Pact of Paris.” What that diplomatic note stated became known as the Stimson Doctrine, the core meaning of which is that any situation arising from illegal acts should not be recognized by the international community.¹⁰¹ The spirit of legality was further sustained by the inclusion of the principle of equality of sovereignty in the UN Charter, which is generally believed as the cornerstone of international law.

Viewing legality as the spirit of international is flawed, however. First, in most cases, states have the total freedom to decide whether and to what extent they will accept international obligations such as joining a multilateral treaty in force. Thus, the behaviors of a state cannot be judged by the legality approach if that state does not ratify a treaty or exit from a treaty that it has accepted. Second, not all international matters are covered by international law. Rather, there are many legal loopholes in international relations. Thus, those international matters cannot be appraised in legal terms. Third, law should not be

⁹⁹ Antonio Cassese, at 13.

¹⁰⁰ See VCLT (1969), rt. 53

¹⁰¹ See David Turns, The Stimson Doctrine on Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law, 11 *Chinese J.L.* 105 (2003).

“frozen” in time. Instead, it should evolve as responsive to changing circumstance. Very far from domestic law, which can seasonably be updated as new circumstances require, international law is less responsive to new situations. As a matter of fact, people often debate how to interpret some international rules that were formed sever decades or centuries ago, for instance, the minimum standard of treatment in investment treaties.¹⁰² As a result, an “evolving interpretation” approach has been employed aimed to make international law more responsive, even though this creates its own set of controversies.¹⁰³ This suggests that the legality approach may be sometimes too rigid to assess the conducts of a state. Fourth, since many international rules either are poorly written or leave great discretion as to their implementation, states may not honor their obligations in good faith. Thus, the legality approach may be too loose to evaluate the behaviors of a state. As a result, international lawyers have introduced the concept of legitimacy as the standard to assess international law, even though its meaning is open. For instance, it is suggested that law should be based on legitimacy as defined in two senses: normative and sociological. The notion of legality concerns the normative sense. In contrast, the sociological sense involves the social acceptance of law. Legality is not a sufficient condition of legitimacy. In other words, a law that provides legality does not necessarily have legitimacy, while an act that is found illegal may be assumed legitimate.¹⁰⁴ Thomas M. Frank developed a sophisticated theory of legitimacy. According to Frank, virtues such as determinacy, coherence, adherence, all vest international law with legitimacy. This explains why states are willing to comply with international law.¹⁰⁵

The end of the Cold War made the Western conception of rule of law popular around the world. More and more non-Western states embraced the rule of law in national governance. The conception of rule of law is also transplanted to international level. In November 1989, the United Nations General Assembly (UNGA) adopted a resolution which acknowledged “the need to strengthen the rule of law in international relations.”¹⁰⁶ However, that resolution did not explain the meaning of international rule of law. Several years later, a report

¹⁰² See generally Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden: A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949); Todd Weiler, *The Interpretation of International Investment Law* (Leiden: Martinus Nijhoff Publishers, 2013).

¹⁰³ See, e.g., David McKeever, *Evolving Interpretation of Multilateral Treaties: Acts Contrary to the Purposes and Principles of the United Nations in the Refugee Convention*, 64 *Int'l & Comp. L.Q.* 405 (2015).

¹⁰⁴ Roman Kwiecien, *International Law as Legal System: Legality, Legitimacy, and Legal Position of States*, 4 *Polish Rev. Int'l & Eur. L.* 9 (2015) 27, 28.

¹⁰⁵ See Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990).

¹⁰⁶ United Nations Decade of International Law, A/RES/44/23, November 17, 1989.

submitted by then Secretary-General Kofi Annan inspired discussions of rule of law at the UN level.¹⁰⁷ That report reads that “at the very heart” of the UN, the rule of law

refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁰⁸

Presumably, the 2004 Report of the UN Secretary-General prompted the inclusion of conception of rule of law into the Outcome Document of 2005 World Summit. Heads of states acknowledged “the need for universal adherence to and implementation of the rule of law at both the national and international levels.”¹⁰⁹ They recognized that rule of law at both the national and the international level, together with good governance, is “essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.”¹¹⁰

In September 2012, the UNGA adopted the High-Level Declaration of the Rule of Law at National and International Level (High-Level Declaration),¹¹¹ which constitutes “an important milestone on the path towards a consensus on the rule of law at national and international levels.”¹¹² The High-Level Declaration stresses the universality of rule of law. It reads as follows:

We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private,

¹⁰⁷ The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, S/2004/616, August 23, 2004.

¹⁰⁸ *Id.*, para. 6.

¹⁰⁹ Resolution on the 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1, October 24, 2005, para. 134.

¹¹⁰ *Id.*, para. 11.

¹¹¹ Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, September 30, 2012.

¹¹² Matthieu Burnay, *Chinese Perspectives on the International Rule of Law* (Cheltenham: Edward Elgar Publishing, 2018) 60.

including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.¹¹³

It should be admitted, while a broadly agreed conception exists,¹¹⁴ a full consensus on the meaning of rule of law has not yet reached,¹¹⁵ and some people are doubtful of the future of the international rule of law.¹¹⁶ However, the importance of the introduction of the rule of law at the international level absolutely should not be underestimated. As Henkin said, the rhetoric creates “an image of itself, either in its own eyes or in its neighbors.”¹¹⁷ Also, as argued by Martti Koskenniemi, the rule of law is “the leading vocabulary—through which we seek to persuade audiences about the justness of our views and the injustice of those put forward by our adversaries.”¹¹⁸ As a concept representing a universal value that no state dares to challenge, the rule of law transcends national boundaries to the international level and brings profound implications for the international community. The aspirations of the international rule of law may prompt international lawmaking so that more international affairs will be included within the orbit of international law. In particular, the established legal practices may be used to appraise and guide international legal practices, even though it is not necessarily desirable and practical. Therefore, it can be argued that the rule of law represents the new spirit of international law.

Of course, international rule of law has different implications on great powers and less powerful countries. For the part of great powers, these countries that are more likely to defy international law may feel less compelled to respect international law and to honor their international obligations while, for the part of less powerful states, they may be more aggressive in their support for international lawmaking.

The idea of international rule of law appears to have prompted some important legal initiatives and actions, which, in particular, impose important political and legal pressures on great powers. Take the regulation of nuclear weapon as an example. Given the “catastrophic humanitarian consequences that would result from any use of nuclear weapons” and “risks posed by the continued existence of nuclear weapons,”¹¹⁹ the TPNW was reached without support of all nuclear powers. On April 24, 2014, the Marshall Islands sought to bring before

¹¹³ High-Level Declaration, para. 2.

¹¹⁴ International law should be “just, fair and equitable.” See High-Level Declaration, para. 2.

¹¹⁵ High-Level Declaration notes “a broad diversity of national experiences in the area of the rule of law.” *Id.*, para. 10. See also Matthieu Burnay, at 11–44.

¹¹⁶ See, e.g., Simon Chesterman, *An International Rule of Law?*, 56 *Am. J. Comp. L.* 331 (2008) 361.

¹¹⁷ Louis Henkin, at 45.

¹¹⁸ Martti Koskenniemi, Introduction, in Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca eds., *International Law and Empire* (Oxford: Oxford University Press, 2017) 4.

¹¹⁹ TPNW, Preamble.

the ICJ lawsuits against nine nuclear-armed states, including China,¹²⁰ arguing that these countries are violating their obligation to “pursue negotiation in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”¹²¹ It was fear of this type of action that makes the TPNW unlikely to be approved by all nuclear powers including China. Eventually, Marshall’s claims were dismissed by the ICJ.¹²² However, those events are not meaningless. For instance, the *Marshall case* arguably imposes pressure on nuclear powers to enhance international law on nuclear weapons on their own terms. As two commentators suggest, the *Marshall case* highlights a new politics of nuclear disarmament challenging the very legitimacy and legality of nuclear weapons possession and reflects a growing belief that the Nuclear Non-Proliferation Treaty (NPT) should be treated as part of customary international law.¹²³

3. What International Law Matters to the Rise of China

From a historical perspective, it is safe to argue that international law has done little in containing great powers from abusing their power and thus has failed to deliver justice, especially to those less powerful countries, for centuries. It thus is argued that the history of international law largely is the history of imperialism.¹²⁴ International law did not outlaw but instead legalized the colonization of the world by great powers since the seventeenth century. International law was expanded to serve the narrow interests of great powers.¹²⁵ International law contributed to “legalized hegemony.”¹²⁶ Great powers are not hesitant to limit or resist the application of international law that may be unfavorable to them.¹²⁷

¹²⁰ “Marshall Islands sues nine nuclear powers over failure to disarm,” available at <https://www.theguardian.com/world/2014/apr/24/marshall-islands-sues-nine-nuclear-powers-failure-disarm>.

¹²¹ NPT, art. 6.

¹²² See, e.g., *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016.

¹²³ Avner Cohen and Lily Vaccaro, “The import of the Marshall Islands nuclear lawsuit” (May 6, 2014), available at <https://thebulletin.org/2014/05/the-import-of-the-marshall-islands-nuclear-lawsuit/>.

¹²⁴ See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Wilhelm G. Grewe, *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000).

¹²⁵ Antonio Cassese, at 31. See also Nico Krisch, *International Law in Times of Hegemony*, 16 *Eur. J. Int’l L.* 369 (2005) 381–407.

¹²⁶ See generally Gerry Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004).

¹²⁷ See generally Helen Keller and Daniela Thurnherr, *Taking International Law Seriously* (Berne: Staempfli Publishers Ltd., 2005).

Perhaps because of this, international law has not lived up to the great expectation of many—if not most—of the less powerful countries that had hoped it would help protect their sovereignty and promote prosperity.¹²⁸

As suggested in Section 2, many important changes have happened to international law. These changes contribute to a somewhat different relationship between great powers and international law. Thus, international law must be more relevant—expectedly or unexpectedly—to the rise of China. Interactions between the rise of China and international law will be examined in depth in the remaining chapters. Based on my perceptions of international law in terms of community, power, adjudication, and spirit as illustrated in Section 2, here I would like to present three general observations.

Firstly, international law increases the legality and legitimacy of the rise of China. In the past several decades, international law has substantially expanded in terms of scope and content, placing more international interactions under legal regulation. Furthermore, as the international legal process becomes more transparent and participatory and the idea of international rule of law has emerged, international law tends to be more “just, fair and equitable,” thereby increasing its legitimacy. Accordingly, international law can endow legality and legitimacy to the behaviors of China. As a matter of fact, in a sharp departure from China’s traditionally skeptical or hostile attitude toward international law, since the 1990s China has accelerated its involvement in international society by, for instance, signing more international treaties and joining more international institutions, and has begun to more frequently use the language of international law to explain its behavior in international society.¹²⁹ More recently, China loudly called for international rule of law,¹³⁰ promising that China would be a “staunch defender and builder” of international rule of law.¹³¹

On the other hand, while international law now functions better to endow legality and legitimacy, it also imposes more constraints on China than it has done to great powers in history. China is not only obliged to honor the international obligations to which it has committed itself, but China is also compelled to subject itself to international obligations even when it may be reluctant to do so. More generally, China is expected to shoulder more responsibility in building a better international society. In particular, a serious emerging concern

¹²⁸ See generally Richard Falk, Balakrishnan Rajagopal, and Jacqueline Stevens eds., *International Law and the Third World* (London: Routledge, 2008).

¹²⁹ James V. Feinerman, Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?, 1995 *China Q.* 186 (1995) 188.

¹³⁰ Xi Jinping, Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World Through Win-Win Cooperation, Speech on the Five Principles of Peaceful Coexistence (June 28, 2014), available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml.

¹³¹ Wang Yi, “China, a Staunch Defender and Builder of International Rule of Law” (October 29, 2014), available at <http://www.china-un.org/eng/hyyfy/t1205399.htm>.

for China is that international law may be used to challenge its behavior. In particular, China is alarmed by the SCS arbitration initiated by the Philippines against China in 2013. China has argued that international law was abused by the Philippines and misinterpreted by international tribunal to deny its international rights.¹³² As a result, China has warned that it concerns international law and, more generally, international rule of law, are at risk of being misused or abused. For instance, China's President Xi Jinping stated in 2014:

In the international society, there should be just one law that applies to all. There is no such law that applies to others but not oneself, or vice versa. There should not be double standards when applying the law. We should jointly uphold the authority and sanctity of international law and the international order. All countries should exercise their rights in accordance with the law, oppose bending international law, and reject any attempt to undermine, in the name of "rule of law", other countries' legitimate rights and interests as well as peace and stability.¹³³

Secondly, international law has prompted extensive changes in Chinese legal policies and practices at national and international levels.¹³⁴ Many international obligations to which China has committed require domestic implementation. For this purpose, Chinese has undertaken numerous reforms in political, economic, social, cultural, and judicial areas in the past several decades. Chinese national governance has witnessed a fundamental transformation, even though more efforts need to be made. Equally important, if not more important, China has begun to devise and implement new international legal policies as China rises as a new great power. In other words, China is no longer satisfied with merely being a good citizen with respect to international legal compliance, which required China to be merely a norm taker. Rather, China seeks more norm entrepreneurship in the international legal order. In a word, China not only seeks to better accommodate international law. It also seeks international law to better accommodate China.

Thirdly, China's government and corporations will be more involved—willingly or unwillingly—in international adjudication, and this in turn will bring about substantial implications for the role of international adjudication in international relations.¹³⁵ Julian Ku rightly observed that the rise of

¹³² See in detail Chapter Seven, Section 4.

¹³³ Xi Jinping, "Speech on the Five Principles of Peaceful Coexistence" (June 28, 2014), available at http://www.china.org.cn/world/2014-07/07/content_32876905.htm.

¹³⁴ See in detail Chapter Three.

¹³⁵ See in detail Chapter Seven, Section 1.

international adjudication has coincided with the rise of the People's Republic of China (PRC) as a leading economic and political power.¹³⁶ Although China persists with its long-established policy favoring negotiation and consultation instead of international adjudication as the preferred method to be used to resolve international disputes, there is a trend that China will participate more in international adjudications. This presents its own challenges, as international adjudication is used by other states to challenge China. In particular, some less powerful states may rely upon international courts to challenge China. The strategy of judicialization increases the difficulty and costs for China to wield its power against those less powerful states. This is evidenced by the SCS arbitration. On the other hand, China, by subjecting itself to international adjudication which legalizes the settlement of international disputes, can reduce the wariness of some less powerful states as to whether China exercises *Realpolitik*.

4. Concluding Remarks

A major difference between the rise of China and the rise of old great powers like the U.K. and the U.S. may be the changing role that international law now plays in international relations. In history, international law did little in restraining great powers. Instead, it facilitated and legalized the imperialism pursued by great powers. However, since the second half of the twentieth century international law has significantly transformed. More international regimes and institutions have been created. John Garrick and Yan Chang Bennett rightly observed that “the emerging global system has gained prominence around the same time as China’s integration into the international legal framework after years of relatively inward-focused development.”¹³⁷ Furthermore, international law tends now to be justice-oriented instead of power-oriented.¹³⁸ Several years ago, I suggested that international law has increased its own “power” against *Realpolitik* and can impose more constraints on great powers in handling of international affairs.¹³⁹

All of this should remind people that, when they debate on how China devises and conduct its international legal policies and practice and, more generally,

¹³⁶ Julian Ku, China and the Future of International Adjudication, 27 *Md. J. Int’l L.* 154 (2012) 155.

¹³⁷ John Garrick and Yan Chang Bennett eds., *China’s Socialist Rule of Law Reforms under Xi Jinping* (London: Routledge, 2016) xxiii.

¹³⁸ See generally Jeff Handmarket and Karin Arts eds., *Mobilizing International Law for “Global Justice”* (Cambridge: Cambridge University Press, 2019); Steven Ratner, *The Thin Justice of International Law* (Oxford: Oxford University Press, 2015); Rüdiger Wolfrum and Chie Kojima eds., *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2009).

¹³⁹ Congyan Cai (2013), at 765.

what the rise of China will bring to the world, they should bear in mind that international law has significantly changed in the past several decades and will continue to change in the coming years. Thus, international law may enhance and justify the rise of China. It may also impose more hurdles on China than it did to old great powers in history. In a word, a safe judgment is that international law is more relevant to the rise of China than it was to old great powers.

State Identity and Legal Policies

1. Introduction

A thorny issue which nearly all those who engage with China encounter and must answer is: What is/was China? Different answers on China's state identity have been given by different persons, at different times, in different contexts. Historically, China was admired as a Middle Kingdom,¹ or a nation with a brilliant civilization, and so on.² China was also alarmingly described as a "sleeping giant,"³ a "Yellow Peril,"⁴ or, more recently, a "revolutionary state."⁵ Since the beginning of the twenty-first century, China has begun to be considered as a "rising power,"⁶ a "neo-colonial" power,⁷ an "authoritarian great power,"⁸ or a "revisionist power,"⁹ and so on. China has been urged to behave as a "responsible stakeholder" in international affairs.¹⁰ For China's part, in its constitutions it has long identified itself, explicitly and implicitly, as a "developing state,"¹¹ a "socialist state,"¹² and a country with "a century of humiliation."¹³ Since the late 1990s, China has begun to proclaim itself a "responsible power," or a "rising power."¹⁴

¹ See David Scott, *China Stand Up* (London and New York: Routledge, 2007) 9–11.

² See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996) 45.

³ Two centuries ago, Napoleon warned: "China is a sleeping giant. Let her lie and sleep. For when she awakens, she will shake/threaten the world." Cited from David Scott, at 15.

⁴ See David Scott, at 15–17.

⁵ David Armstrong, *Revolution and World Order* (Oxford: Clarendon Press, 1993) 176–184; David Scott, at 41–59; Howard L. Boorman, China and the Global Revolution, 1960 *China Q.* 3 (1960).

⁶ Wang Jisi, China's Search for a Grand Strategy: A Rising Great Power Finds Its Way, 90 *Foreign Aff.* 68 (2011).

⁷ Austin Campbell, Riding a "Friendly Elephant"? How African Nations Can Make the Best of Economic Partnership with China, 49 *Vand. J. Transnat'l L.* 499 (2016) 511.

⁸ Azar Gat, The Return of Authoritarian Great Powers, 86 *Foreign Aff.* 59 (2007).

⁹ National Security Strategy of the United States of America, December 2017, at 25.

¹⁰ Robert B. Zoellick, Whither China: From Membership to Responsibility?, Remarks delivered to the National Committee on U.S.-China Relations, September 25, 2005.

¹¹ See, e.g., China's Constitution (1982, as amended in 2018), Preamble.

¹² See, e.g., China's Constitution (1982, as amended in 2018), art. 1.

¹³ China's Constitution (1982, as amended in 2004), Preamble. See also David Scott, at 11–14.

¹⁴ Wang Yi (Foreign Minister of China), "Exploring the Path of Major-Country Diplomacy with Chinese Characteristics" (June 27, 2013), available at <http://in.china-embassy.org/eng/xwfw/xxf/b/t1054539.htm>.

Furthermore, it seems that on some occasions, China's international legal policies have deviated from the state identity that it claims, but on some other occasions, China has been reluctant to pursue new international legal policies that appear conducive to its state interests. In other words, China sometimes is placed in a dilemma when considering which legal policy should be adopted to orient its activities. Thus, the identity of China can serve a starting point to understand China's international legal policies. While sociologists have long debated whether identity "in itself" can cause a behavior, it is hardly disputable that identity can make a difference in behavior.¹⁵

This chapter aims to answer the following questions: How has China's state identity changed since the nineteenth century when the Chinese empire began to be forced to engage with the Western world, especially since the founding of the PRC in 1949 when China had begun to embrace socialist ideology and regime at odds with those in the Western world? What is China in the twenty-first century? What implications does China's identity have on its international legal policies? How does China respond to the conventional assumption of the relationship between state identity and behaviors? And how does China seek to reduce the potential dissonance between its new identity and behavior, as well as reassure other countries that are wary about the rise of China? In addition to the introduction and concluding remarks, this chapter includes four sections. Section 2 provides a briefing on the various theories of identity. It focuses on several issues which are highly relevant to understanding China's state identity and international legal policies. They mainly refer to multiple identities, the change of identity, the identification of identity, and the relationship between identity and behavior. Section 3 traces the evolution of China's identity from the four perspectives of ideology, power, governance, and civilization. This section first examines the evolution of China's state identity from an orthodox socialist state to a "revisionist" socialist state, from a special developing state to a special rising great power, from a rule-of-man state to a rule-of-law state, and from a falling civilized state to a reviving civilized state. Section 4 discusses the conventional thinking on the relationship between the change of state identity and the development of state behaviors in international relations and then examines how China responds to the conventional thinking. Section 5 presents general observations and an evaluation of China's international legal policies in the context of China's new state identity.

¹⁵ Richard Jenkins, *Social Identity* (London and New York: Routledge, 2008, 3rd ed.) 5.

2. Identity and Behavior

Many philosophers deem that the twenty-first century can be called the “era of identities.”¹⁶ Identity, which is full of perplexities, is generally defined as the human capacity to know “who’s who (and hence ‘what’s what’)” in social contexts.¹⁷ It involves “knowing who we are, knowing who others are, then knowing who we are, us knowing who they think we are . . .”¹⁸ It is asserted by both the identity holder himself and other persons, and in the long run it is the result of interactions—concurrent or conflicting—between the identity holder and others. Therefore, the identification of identity is a process of social learning and social construction,¹⁹ not merely a mirror reflection of objective facts. Thus, such variables as the capacity of cognition, circumstance, power, and interactions can play their respective roles in the process of identification of identity.

Identity contains a set of meanings to define the character of identity, which is called “identity standard.” For instance, “As a man, I am strong, resourceful, independent, and assertive,” while “As a woman, I am supportive, warm, affectionate, and tender.”²⁰ Thus, the identification of identity firstly requires the identification of “meanings.” Obviously, however, not all “meanings” are as clear-cut as the distinction between “man” or “woman.” Instead, people may have different conceptions of a particular meaning, for instance, the rule of law. Furthermore, people may disagree on what meanings should be included, and what weight a meaning should be granted, in the identification of identity.

Some theorists stress that the identification of the identity of a person is, in some sense, finding how he differs from others. However, this approach of difference to identity is not universally supported. For instance, Richard Jenkins suggested that the focus on difference “misses the utter interdependence, whether in abstract logic or messy everyday practice, of similarity and difference.” He argued that “to say who I am is to say who or what I am not, but it is also to say with whom I have things in common.”²¹ The stressing of similarity rather than difference between persons increases the feeling of some shared belonging or solidarity, which enhances social intercourses.

There is a consensus among sociologists that a person has multiple identities. Multiple identities have complicated implications. First, a person, out of some

¹⁶ Karina V. Korostelina, *Social Identity and Conflict: Structures, Dynamics, and Implications* (New York: Palgrave Macmillan, 2007) 15.

¹⁷ Richard Jenkins, at 5.

¹⁸ *Id.*

¹⁹ Karina V. Korostelina, at 15.

²⁰ Peter J. Burke and Jan E. Stets, *Identity Theory* (New York: Oxford University Press, 2009) 63.

²¹ Richard Jenkins, at 21.

particular consideration (interest calculation, etc.), may choose to assert one of their multiple identities, depending on what or with whom they would engage, or where engagements happen. Second, the concept runs the risk of identity conflicts.²² Different identities may conflict with each other. As a result, a person may face the dilemma of deciding which identity he should assert on a specific occasion. Zygmunt Bauman suggested that a major problem facing an individual in the twenty-first century is which identity he would choose.²³ This assumes, however, that a single identity must be chosen. A person may assert any one of multiple identities which he holds but for some reason is reluctant to assert, and accordingly have the expectation that another person should behave in a particular manner because of that particular identity.

Also, identity is not static. Instead, it may change over time. Peter J. Burke and Jan E. Stets suggested several sources of change.²⁴ The first one refers to change in the situation. Burke and Stets argued that a person has two options in the context of changing situation: either alter the new situation to match his identity or change his identity to match the new situation. The first option is presumably less workable than the second one. Thus, Bauman prefers the second one. According to Bauman, a major problem in the twenty-first century is how a person changes his identity if it is ineffective in certain socioeconomic conditions.²⁵ However, there might be a third option: a person may decline entirely to adjust his identity to a situation, and this strategy might work for some time as well. The second one concerns identity conflicts. As mentioned, a person has multiple identities conflicting with each other. However, not all conflicting identities are always claimed simultaneously. Instead, one of them may be claimed while others are not. Nevertheless, when these conflicting identities are claimed simultaneously, one might be preferred over others. The third one is the identity standard and behavior conflicts. While certain behaviors of a person coincide with an identity, they may be at odds with another. As a result, the person may find that he has to adjust the latter identity. The final one refers to the influences from others. As previous discussions on concept of identity suggest, the identification of the identity of a person is influenced by interactions with others,²⁶ which obviously change over time.

Sociologists found that, while identity often generates a fundamental impact on behavior, it in itself could not predict behavior.²⁷ A general proposition appears sound: identity may have important bearing on behavior but cannot

²² Peter J. Burke and Jan E. Stets, at 183.

²³ Zygmunt Bauman, *In Search of Politics* (Cambridge: Polity Press, 1999) 29.

²⁴ Peter J. Burke and Jan E. Stets, at 180.

²⁵ Zygmunt Bauman, at 29.

²⁶ Peter J. Burke and Jan E. Stets, at 180–186.

²⁷ See Richard Jenkins, at 5.

determine everything; the link between identity and behavior is “neither straightforward nor always predictable.”²⁸

The identification of identity is often filled with disagreements, antinomies, or hesitations because identity is arguably highly relevant to interests, which has long been debated among sociologists. Some argue that the identification of identity can entail interests and thus identity merely is the byproduct of pursuing interests. Jenkins suggested that “[h]ow I define my interests may encourage me to identify myself in particular ways. How other people identify me has a bearing on how they define my interests, and, indeed, their own interests.”²⁹ However, a person may sometimes pursue interests which are in conflict with his identity,³⁰ while sometimes he may choose to maintain his identity at the expense of his interests.

It should be noted that the concept of identity initially was developed to explain the behaviors of individuals at the domestic level. Nevertheless, since state identity is observed through the cognitive process of individuals and state actions are also conducted by individuals, theories of identity largely apply to states.³¹ The concept of individual-based identity was brought to an international level mainly by constructivists. Some constructivists argue that “state identities and interests are an important part constructed by [these] social structures, rather than given exogenously to the system by human nature or domestic politics” and “interests are dependent on identities.”³² Of course, states, unlike individuals, belong to social creatures built on sophisticated regimes, institutions, and mechanisms. As a result, there are more variables that influence state identity and thus the identification of state identity is more complicated. As far as ways to identify the identity of a state are concerned, Kuniro Ashizawa stressed the examinations of words and deeds of individuals who are involved in policymaking,³³ while Alla Kassianova attached much importance to governmental documents.³⁴

²⁸ Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford: Oxford University Press, 2015) 98.

²⁹ Richard Jenkins, at 7.

³⁰ *Id.*, at 7.

³¹ Kuniro Ashizawa, When Identity Matters: State Identity, Regional Institution-Building, and Japanese Foreign Policy, 10 *Int'l Stud. Rev.* 571 (2008) 575.

³² Alexander Wendt, Collective Identity Formation and the International State, 88 *Am. Pol. Sci. Rev.* 384 (1994) 385.

³³ Kuniro Ashizawa, at 576.

³⁴ Alla Kassianova, Russia: Still Open to the West? Evolution of the State Identity in the Foreign Policy and Security Discourse, 53 *Eur.-Asia Stud.* 821 (2001) 826.

3. Evolution of China's State Identity

Like other states, China also has multiple identities. In this section, I aim to conceptualize China's state identity and to examine its evolution from four perspectives of ideology, power, governance, and civilizations. In light of the changing international relations as a whole, as well as the evolution of China itself, state identity can serve as a starting point to understand Chinese international legal policies in the context of China's rise. My core argument in this section is that in the past several decades, China has evolved, and is evolving, from an orthodox socialist state to a "revisionist" socialist state, from a special developing state to a special rising power, from a rule-of-man state to a rule-of-law state, and from a falling civilized state to a reviving civilized state

3.1 From an Orthodox Socialist State to a "Revisionist" Socialist State

3.1.1 An Orthodox Socialist State

The Bolshevik Revolution which occurred in Russia in 1917 divided the world into a bourgeoisie/capitalist segment and a proletarian/socialist segment with competing ideologies. The Communist revolution fomenting in China since the early 1920s was a part and continuance of the Bolshevik Revolution in Russia. As a matter of fact, the Chinese Communist Party (CCP) received substantial ideological, financial, and personnel support, as well as guidance and directions, from the USSR and the Communist International under the control by the Communist Party of the USSR. Of course, the CCP disagreed with the USSR and the Communist International on a number of fundamental issues, such as how to implement Marxism-Leninism theory in China. Those disagreements did not prevent the CCP from deciding in 1949, shortly before taking power in China, to ally with the USSR and thus joined the socialist bloc led by the USSR.³⁵

The constitution of a state obviously is the most authoritative instrument with which to ascertain its identity. Thus, I would like to first examine the changing identity of China by reviewing the evolution of China's constitutions. The first constitutional instrument, the Common Program of Chinese People's Political Consultative Conference ("Common Program"), was adopted on September 29, 1949, as the Interim Constitution of the PRC.³⁶ According to the Common

³⁵ John W. Garver, *China's Quest: The History of the Foreign Relations of the People's Republic of China* (Oxford: Oxford University Press, 2016) 29–32.

³⁶ See generally Jinfan Zhang, *This History of Chinese Constitution* (Beijing: China Legal Publishing House, 2016) 348–353 (in Chinese).

Program, China, politically, would be a state under the “people’s democratic dictatorship led by the working class”;³⁷ economically, a state-run economy with a “Socialist nature” would be the dominant modality in Chinese economy, but other economic modalities (for instance, private capitalist economy and state capitalist economy) were also allowed.³⁸ The Common Program did not provide that China was a socialist state, however. Instead, it provided that China would be “a New Democratic, namely, People’s Democratic state.”³⁹ Simply put, China, in some sense, was still a capitalist state as it was in the period of the Republic of China (ROC). A major reason, arguably, was that the working class or proletarian class in China was not strong in the late 1940s so that it had to cooperate with other social forces including the capitalist class or bourgeoisie.⁴⁰ The constitution adopted on September 20, 1954 (“Constitution (1954)”), the first constitution of the PRC,⁴¹ contained a more detailed description of China’s identity at that time. According to the Constitution (1954), “a period of transition” was needed to develop China into a socialist state.⁴² At this time, China was still a “people’s democratic state.”⁴³

Although it was initially assumed that China would take “quite a long time” to finish the process of transition to socialism,⁴⁴ this process was suddenly sped up in 1957, only three years after the adoption of Constitution (1954). In 1957, China initiated the so-called Anti-Rightist Campaign, which aimed to suppress growing criticism of the CCP’s ideological repression and to ensure socialist ideology went unchallenged in China. A year later, China launched the Great Leap Forward, a major purpose of which was to accelerate economic socialization, wiping out the private economy. More profoundly, Chairman Mao Zedong (Mao Tse-Tung) launched the far-reaching Cultural Great Revolution (1966–1976) with the aim to “purify” China’s socialist identity in all aspects.⁴⁵ In January 1975, China approved its second constitution (“1975 Constitution”),⁴⁶

³⁷ Common Program, art. 1.

³⁸ Common Program, arts. 28, 26.

³⁹ Common Program, art. 1.

⁴⁰ Common Program, Preamble.

⁴¹ See generally Zhang Jinfan, at 354–368.

⁴² Constitution (1954), Preamble.

⁴³ Constitution (1954), art. 1.

⁴⁴ Department of Unification Front of the Central Committee of the Chinese Communist Party, *Collected Work of Zhou Enlai on Unification Front* (Beijing: People’s Press, 1984) 38 (in Chinese).

⁴⁵ In his speech delivered before the UN Assembly, the Chinese representative explained: “The Great Proletarian Cultural Revolution, which has been carried out in China in recent years, and the campaign of criticizing Lin Biao and Confucius now under way throughout China, are both aimed at preventing capitalist restoration and ensuring that socialist China will never change her colour and will always stand by the oppressed peoples and oppressed nations.” Speech by Chairman of the Delegation of the People’s Republic of China, Deng Xiaoping, At the Special Session of the U.N. General Assembly (April 10, 1974), available at <https://www.marxists.org/reference/archive/deng-xiaoping/1974/04/10.htm>.

⁴⁶ See generally Zhang Jinfan, at 371–375.

That constitution, for the first time, announced that China had become a socialist country. It explicitly provided that China was “a socialist state” with proletarian dictatorship and under the leadership of the working class and that the working class governed the country through “the CCP equipped with Marxism-Leninism and Mao Zedong Thought.”⁴⁷ In particular, it stipulated that in the history of socialism,

classes, class conflict and class struggle always exist, struggle between the socialist road and the capitalist road exists, a risk of the resurrection of capitalism exists, and threats from imperialism, socialist imperialism to conduct subversion and aggression exist. These contradictions will be resolved with the theory and practice of continuous revolution under the Proletarian dictatorship.⁴⁸

In addition to this general language, the Constitution (1975) included a number of provisions aimed to maintain China’s socialist identity. For instance, it required that a “state-run” economy be dominant in China,⁴⁹ and individuals were not allowed to damage socialist economy in any manner.⁵⁰ Furthermore, the proletarian class should exercise overall dictatorship to the superstructure, including all cultural activities.⁵¹

In accordance with the orthodox socialist theory by Karl Marx and Frederick Engels,⁵² it is assumed that China became an orthodox socialist state or a “revolutionary state” in the 1960s and 1970s.

3.1.2 A “Revisionist” Socialist State

The rash transition to an orthodox socialist state soon placed China in political, economic, legal, and social catastrophes. In the late 1970s, Communist China found itself at the edge of collapse. In 1979, the CCP was forced to declare that China would start the Reforming and Opening-up Policy. Internally, China tried to reconstruct political, economic, legal, and ideological governance; externally, China sought to engage, in a more cooperative manner, with the Western countries-led international order which it once pledged to overthrow.⁵³ As a result, China gradually moved to a “revisionist” socialist state which deviated,

⁴⁷ Constitution (1975), arts. 1 and 2.

⁴⁸ Constitution (1975), Preamble.

⁴⁹ Constitution (1975), art. 6(1).

⁵⁰ Constitution (1975), arts. 5(2) and 8.

⁵¹ Constitution (1975), art. 12.

⁵² See Manifesto of the Communist Party, available at <https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>.

⁵³ John W. Garver, at 349–382.

to varying degrees, from orthodox socialist ideology. Compared with the once orthodox socialist states, China, in the period of a “revisionist” socialist state, placed its priority on national reconstruction rather than socialist revolution.

China’s third constitution, which was adopted in 1982 (“Constitution (1982)”)⁵⁴ bore witness to this transformation. This constitution provided that

[t]he basic task of the state is to concentrate its effort on socialist modernization. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship and the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system, and work hard and self-reliantly to gradually modernize industry, agriculture, national defence and science and technology to build China into a socialist country with highly developed civilization and democracy.

Several other provisions in the Constitution (1982) and its amendments also reflected China’s changing identity. For instance, Article 18 of Constitution (1982) specified that foreign investors were allowed to invest in China and their rights were protected. The first amendment of the Constitution (1982), which was adopted in 1988 (“Amendment (1988)”)⁵⁵ stated that “[t]he private sector of the economy is a complement to the socialist public economy.”⁵⁶ This represented an important development because the “private” economy was the very thing that the PRC, under orthodox socialist theory, had sought to wipe out since it was founded in 1949.

In 1993, China adopted its second amendment to the Constitution (1982) (“Amendment (1993)”)⁵⁷. This amendment went even further and provided that China would move toward a “socialist market economy.”⁵⁸ This was incredible progress because a “market economy” squarely conflicts with orthodox socialist ideology, and any socialist countries could not but practice “command economy.”⁵⁹

It should be stressed, however, that the Constitution (1982) reaffirmed that China was a socialist country. It explicitly provides that

⁵⁴ Adopted on December 4, 1982 by the Fifth NPC of the People’s Republic of China at its fifth session.

⁵⁵ Amendment to Constitution (1982), adopted at the First Session of the Seventh NPC of China on April 12, 1988.

⁵⁶ Constitution (1982, as amended in 1988), art. 11.

⁵⁷ Adopted at the First Session of the Eighth NPC of China on March 29, 1993.

⁵⁸ Amendment (1993), art. 7. *See also* Constitution (1982, as amended in 1993), art. 15.

⁵⁹ *See* Constitution (1982), arts. 6(1), 15(1).

[t]he socialist regime is the basic regime of the People's Republic of China. Disruption of the socialist regime by any organizations or individuals is prohibited.⁶⁰

In particular, it provides:

The exploiting classes as such have been eliminated in our country. However, class struggle will continue to exist within certain bounds for a long time. The Chinese people must fight against those forces and actors, both at home and abroad, that are hostile to China's socialist system and plot to undermine it.⁶¹

The provision of "class struggle" remained without any change until 2004 when China amended its constitution again ("Amendment (2004)").⁶² The fact that the "class struggle" provision long appeared in China's constitutions implies that China maintained its long-term presumption that there are potentially confrontations between socialism and capitalism at home and abroad. As suggested in Section 5.1.1, that provision and underlying presumption have ongoing impacts on Chinese international legal policies.

In addition to the market economy provision, the Amendment (1993) contained another provision which has been highly relevant to Chinese international legal policies since the 1990s. The amendment, for the first time, admitted that China was at the "preliminary stage" of socialism.⁶³ The Amendment (2004) further provided that this preliminary stage may last "for a long period."⁶⁴ The two amendments implied that, on the one hand, China acknowledged that the current socialist regime needed to be improved. Therefore, it increased the China's willing to engage international society in a constructive manner, for instance, by negotiating international treaties and honoring international obligations. On the other hand, they implied that disagreements between China and other states, especially capitalist states, would long exist. Therefore, it is expected that China could not fully live up to international expectations in terms of either making or honoring international commitments

At the core of the socialist identity of China is the leadership of CCP as the sole ruling party. A distinguished Chinese lawyer suggested that "the CCP's influence and control is ubiquitous; it penetrates every aspect of society,"

⁶⁰ Constitution (1982), art. 1(2). *See also* Constitution (1982, as amend in 2004), art. 1(2).

⁶¹ Constitution (1982), Preamble.

⁶² *See* Constitution (1982, amended in 2004), Preamble. The amendment was adopted by the Tenth NPC of China on March 14, 2004.

⁶³ Amendment (1993), art. 3.

⁶⁴ Constitution (1982, as amended in 2004), art. 18.

therefore, “there is no such thing as government policy independent from the CCP.”⁶⁵ It should be specifically noted that China’s Reforming and Opening-up Policy focuses on economic field rather than the political field. In particular, a principled assumption for the CCP is that the Reforming and Opening-up Policy would not be allowed to proceed at the expense of the socialist regime and the leadership of the CCP in China. Deng Xiaoping, a former state leader and, in particular, the “General Designer” of Chinese modernization project starting in the late 1970s, warned that the Reforming and Opening-up Policy must be conducive to maintaining the socialist regime and the leadership of the CCP in China,⁶⁶ and that China would always persist its socialist road.⁶⁷ As China continually liberalizes its economy, however, the tension between the market-motivated pursuit of economic liberalism and the CCP-led control of political democracy has become more and more acute, which was recognized by Deng Xiaoping as early as the mid-1980s.⁶⁸

Notably, in recent years China has tended to assert its socialist identity. In the Decision Concerning Some Major Issues in Comprehensively Deepening Reforms adopted by the CCP in November 2013 (“the CCP Decision (2013)”),⁶⁹ which depicts China’s reform roadmap during the presidency of Xi Jinping, the CCP stresses that “confidence on Socialist Course, Theory, and Regimes with Chinese characteristics” (“Three Confidences”) should be always maintained.⁷⁰ President Xi Jinping repeatedly stressed the “confidence in the Political system of Chinese socialism.”⁷¹ The amendment of the Constitution (1982) in March 2018 (“Amendment (2018)”) represents the latest fundamentally legal measure. The Amendment (2018), for the first time, explicitly provides that “the leadership of the CCP is the most essential feature of the Socialism with Chinese characteristics.”⁷²

The trend to reclaim the socialist identity not difficult to understand. As China continually increasingly participates in the Western states-led international order, which, explicitly or implicitly, requires the relaxation of socialist

⁶⁵ Zhu Suli, Political Parties in China’s Judiciary, 17 *Duke J. Comp. & Int’l L.* 533 (2006–2007) 535, 538.

⁶⁶ Literature Office of the Central Committee of the CCP ed., *Selected Works of Deng Xiaoping* (Vol. 3) (hereinafter “*Selected Works of Deng Xiaoping* (Vol. 3)”) (Beijing: People’s Publishing House, 1993), at 241 (in Chinese).

⁶⁷ *Id.*, at 345.

⁶⁸ *Id.*, at 240.

⁶⁹ Adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on November 12, 2013, available at http://english.court.gov.cn/2015-10/08/content_22130532.htm (last visited January 1, 2018).

⁷⁰ The CCP Decision (2013), Part One.

⁷¹ Xi Jinping, *The Governance of China* (Volume II) (Beijing: Foreign Language Press, 2017) 311–317.

⁷² Constitution (1982, as amended in 2018), art. 1(2).

ideology and the liberalization of national governance, the decades-old concern that Western countries are assumed to always seek a “peaceful transformation” of Chinese socialist regime⁷³ seems to become more challenging for the CCP.

3.2 From a Special Developing Country to a Special Rising Great Power

3.2.1 A Special Developing Country

China was once a superpower in the world. Paul Kennedy, in his examination of the rise and fall of great powers, acknowledged that “of all the civilizations of pre-modern times, none appeared more advanced, none felt more superior, than that of China.”⁷⁴ China was admired as a Middle Kingdom.⁷⁵

However, the Opium War (1839) and the Treaty of Nanking (1842) reversed the relationship between China and the outside world. These two events arguably represented “turning-points” in Sino-Western relations.⁷⁶ From then on, China began to be disqualified from treatment as a normal member—let alone the once superpower—in an international society which had been overwhelmingly conceptualized by Western powers since the seventeenth century. It was forced to integrate into international society mainly based on “unequal treaties.” These treaties authorized, among others, Western powers to enjoy capitulation and to manage customs affairs in China.⁷⁷ China thus evolved into “a semi-colonial” country.⁷⁸

China always strived for normal status in the international community and, more ambitiously, sought to restore its historical great power status by taking a variety of measures, which included being involved in wars,⁷⁹ attending international conferences,⁸⁰ and reforming national governance.⁸¹ By the 1940s,

⁷³ In 1989, Deng Xiaoping warned that “we must adhere to socialism and prevent peaceful evolution towards capitalism.” *Selected Works of Deng Xiaoping* (Vol. 3), at 334–346 (in Chinese).

⁷⁴ Paul Kennedy, at 4.

⁷⁵ See David Scott, at 9–11.

⁷⁶ Gerrit W. Gong, *The Standard of “Civilization” in International Society* (Oxford: Clarendon Press, 1984) 136.

⁷⁷ See Dong Wang, *China’s Unequal Treaties: Narrating National History* (Lanham: Lexington Books, 2008); Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, *Recueil des Cours*, vol. 221–II(1990), Chapter 2; Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman, and China* (Cambridge: Cambridge University Press, 2010) Chapter 5.

⁷⁸ See Constitution (1982, as amended in 2004), Preamble.

⁷⁹ See Guoqi Xu, *China and the Great War* (Cambridge: Cambridge University Press, 2005) Chapter 5.

⁸⁰ *Id.*, Chapter 7.

⁸¹ See Immanuel C. Y. Hsü, *China’s Entrance into the Family of Nations* (Cambridge: Harvard University Press, 1960) Part Three; Shogo Suzuki, *Civilization and Empire: China and Japan’s Encounter with European International Society* (Florence: Routledge, 2009), Chapter 4.

China was finally recognized as a “normal” state after those “unequal treaties” were fundamentally revised, terminated, or repealed.⁸² In particular, China became one of five permanent members in the UN Security Council in 1945,⁸³ which significantly increased China’s international status.

However, the attainment of permanent membership of the UN Security Council did not mean that China was a great power in the 1940s. As a matter of fact, China would not have been so lucky as to gain admission but for the great support from Franklin D. Roosevelt, then president of the U.S., who painstakingly persuaded the USSR and the U.K. to withdraw their strong opposition of granting China such a privilege.⁸⁴ Even in the mid-1980s, Kennedy argued only that China had potential to emerge as great power.⁸⁵

For the part of China, it never asserted that it was a great power. Rather, it recognized itself as a developing state. In particular, as the relationship between China and the USSR deteriorated in the late 1960s, China sought to enhance its affinity with the developing world. In doing so, Chairman Mao Zedong proposed his famous “Three Worlds Theory” in 1974.⁸⁶ According to this theory, the U.S. and the USSR belonged to the First World; the Second World mainly included Japan, European states, Canada, and Australia; countries in Asia (including China but not including Japan), Africa, and Latin America were grouped into the Third World.⁸⁷ Although Chairman Mao did not explicitly use the term “developing state” in his “Three Worlds Theory,” he clearly acknowledged China was a developing country. More importantly, socialist China, through Mao’s “Three World Theory,” stressed similarities with developing states, which is Jenks’s approach to identity. In his speech delivered at the general debates of the sixth special session of UN General Assembly in 1974, Deng Xiaoping (Teng Hsiao-Ping), who was a Chinese vice premier at that time, explicitly treated the Third World as a group of developing states and clearly stated that “China is a socialist country, and a developing country as well. China belongs to the Third World.”⁸⁸ The provision of the “preliminary

⁸² Gerrit W. Gong, at 163.

⁸³ UN Charter, art. 23.

⁸⁴ During negotiating the new world organization, the Soviet Union and the U.K. were opposed to grant China such a privileged status. See Ruth B. Russell, *History of the United Nations Charter* (Brookings Institution, 1958) 103, 128.

⁸⁵ Paul Kennedy, at 447–457.

⁸⁶ See generally Lai Sing Lam, *The Romance of the Three Kingdoms and Mao’s Global Order of Tripolarity* (Bern: Peter Lang AG, 2011).

⁸⁷ See China’s Ministry of Foreign Affairs (MFA) and Literature Office of the Central Committee of the CCP eds., *Selected Works of Mao Zedong on Diplomacy* (Beijing: the Central Committee of CCP Press/World Affairs Press, 1993) 600 (in Chinese).

⁸⁸ Speech By Chairman of the Delegation of the People’s Republic of China, Teng Hsiao-Ping, At the Special Session of the U.N. General Assembly, April 10, 1974.

stage of socialism” in the Constitution (1982) also implied that China was a developing state.

Nevertheless, China substantially distinguishes itself from many other developing states in that it has been long recognized as having the full potential to rise or revive its status as a great power. For instance, China has “huge population and a vast territory,”⁸⁹ which is important, albeit not indispensable,⁹⁰ for a state seeking the status of a great power. Furthermore, China is a permanent member of UN Security Council. Thus, in 1984 Deng Xiaoping admitted that China was “truly a great power,” even though he warned that China was “a very weak one” within the context of the triangle of the USSR, the U.S. and China.⁹¹ Obviously, it was these endowments that made Kennedy and some other Western commentators recognize years in advance that China had the potential to be a great power.⁹²

3.2.2 A Special Rising Great Power

According to Kennedy, economic power is a factor of utmost importance for the rise and fall of great powers. Economic power causes changes of powers in other fields, for instance, military power or political power, thereby leading to the rise and fall of great powers.⁹³ As far as China is concerned, the Chinese economy has been expanding with nearly 10 percent gross domestic product (GDP) growth per year since the 1980s, and in terms of GDP, it has become the second largest economy in the world, only behind the U.S.⁹⁴ It is widely believed that China will overtake the U.S. as the largest economy in the near future.⁹⁵ As a matter of fact, China has been the largest contributor to world economic growth since the global financial crisis of 2008.⁹⁶ China has also been steadily expanding its military power.⁹⁷

Since the mid-1990s, the existing great powers, for instance, Russia,⁹⁸ France,⁹⁹ and the U.S.,¹⁰⁰ have begun to recognize China as a global or at least

⁸⁹ *Selected Works of Deng Xiaoping (Vol. 3)* 94.

⁹⁰ Michael I. Handel, *Weak States in the International System* (Frank Cass, 1990) 13–14.

⁹¹ *Selected Works of Deng Xiaoping (Vol. 3)*, at 94.

⁹² See also Jonathan D. Pollack, China’s Potential as a Great Power, 35 *Int’l J.* 580 (1979–1980).

⁹³ Paul Kennedy, at xvi–xxv.

⁹⁴ The World Bank in China: Overview, available at <http://www.worldbank.org/en/country/china/overview> (last visited March 20, 2018).

⁹⁵ See, e.g., “China to become largest economy by 2024,” available at <https://www.cnbc.com/2014/09/07/china-to-become-largest-economy-by-2024.html> (last visited March 20, 2018).

⁹⁶ The World Bank in China: Overview.

⁹⁷ See The State Council Information Office of the People’s Republic of China, China’s Military Strategy (May 20, 2015), Part IV, available at <http://www.scio.gov.cn/zfbps/ndhf/2015/Document/1435159/1435159.htm> (last visited March 20, 2018).

⁹⁸ See China-Russia Joint Statement (September 1994), available at <http://www.huaxia.com/zt/2002-38/510413.html> (last visited December 29, 2017).

⁹⁹ See China-France Joint Statement (May 1997), available at http://news.xinhuanet.com/ziliao/2002-09/12/content_559463.htm (last visited December 29, 2017).

¹⁰⁰ See China-U.S. Joint Statement (October 1997), available at http://news.xinhuanet.com/ziliao/2002-01/28/content_257084.htm (last visited December 2017).

a regional great power. For China's part, it also reconceptualized its own state identity in the late 1990s. For instance, in 1999, the Research Division of China's Ministry of Foreign Affairs (MFA), for the first time, used the term "responsible power" (*Fu Zeren Daguo*) to describe China. It wrote that "China steadily stands out its image as a peaceful, cooperative and responsible power."¹⁰¹

The year 2003 was very important in establishing China's new state identity. In November of that year, Professor Zheng Bijian, an influential confidant of then President Hu Jintao, argued that China has found a road of "Peaceful Rise." Along this road, China "strives for rise while pursuing peace and not seeking hegemony."¹⁰² A month later, then Premier Wen Jiabo, in a speech delivered at Harvard University, declared that China was "a rising power dedicated to peace" and that China would follow a "road to peaceful rise and development."¹⁰³ For the first time, China's leaders openly accepted the proposition of a "peaceful rise" and used the phrase "rising power." The term "rise" generally implies becoming a "great power." After Wen's speech, the phrase "peaceful rise" fashionably appeared in governmental documents, speeches and remarks, and so on. The discourse surrounding the use of the term "Peaceful Rise" spurred a wave of debates in China and abroad.¹⁰⁴

There is a general consensus that the rise of China is unique. Some have argued that China is rising as an authoritarian state with socialist ideology,¹⁰⁵ or as a mercantilist state greedy for global economic interests with no due regard for noneconomic concerns.¹⁰⁶ China, however, has its own understanding of its "particularity." In calling for appreciating "a real China," then Premier Wen, in a speech given at the UN General Assembly in 2010, argued that "China, which has come a long way in modernization, is fairly advanced in some areas of development but remains backward in others. And it faces unprecedented challenges brought by problems both old and new. Taken as a whole, China is still in the preliminary stage of socialism and remains a developing country. These are our basic national conditions. This is the real China."¹⁰⁷ In the 2003

¹⁰¹ Research Division of China's Ministry of Foreign Affairs eds., *China's Diplomacy* (Beijing: World Affairs Press, 1999) 4 (in Chinese).

¹⁰² Bijian Zheng, A New Path for China's Peaceful Rise and the Future of Asia, presented at Bo'ao Forum for Asia, November 24, 2003.

¹⁰³ Wen Jiabao, "Turning Your Eyes to China" (December 11, 2003, Harvard University), available at <http://www.china-un.org/eng/zt/wfm/t56090.htm> (last visited January 1, 2018).

¹⁰⁴ See, e.g., Sujian Guo and Shiping Hua eds., *New Dimensions of Chinese Foreign Policy* (Lanham: Lexington Books, 2007).

¹⁰⁵ See, e.g., Azar Gat, The Return of Authoritarian Great Powers, 86 *Foreign Aff.* 59 (2007); Stephanie Kleine-Ahlbrandt and Andrew Small, China's New Dictatorship Diplomacy—Is Beijing Parting with Pariahs?, 87 *Foreign Aff.* 38 (2008).

¹⁰⁶ See, e.g., David Zweig and Bi Fianhai, China's Global Hunt for Energy, 84 *Foreign Aff.* 25 (2005); Stewart Patrick, Irresponsible Stakeholders? The Difficulty of Integrating Rising Powers, 89 *Foreign Aff.* 44 (2010).

¹⁰⁷ Wen Jiabao, Getting to Know the Real China, General Debate of the 65th Session of the UN General Assembly, September 23, 2010.

speech at Harvard University, Premier Wen gave an interesting explanation. He said that “China has a population of 1.3 billion, thus an issue, whatever small it is, would be big, big one if it multiplies 1.3 billion; financial source, whatever huge it is, would be very, very low if it is divided by 1.3 billion.”¹⁰⁸ Thus, China asserts that it still is a developing country.¹⁰⁹

3.3. From a Rule-of-Man State to a Rule-of-Law State

The rule of law has been recognized as “a core principle of governance that ensures justice and fairness, values that are essential to humanity.”¹¹⁰ It is an “essentially contested concept,”¹¹¹ however. There is some variety in its description; for instance, it may be either “thin” or “thick.”¹¹² Nevertheless, there is some consensus as to “its core meaning and basic elements.” For instance, the rule of law means the government of law, the supremacy of the law, and equality of all before the law.¹¹³ In particular, it is overwhelmingly agreed that “what rule of law is *not*: the rule-of-man.”¹¹⁴

3.3.1 A Rule-of-Man State

Indeed, law played some role in national governance in early China. Confucianism and Legalism were two main schools of legal thoughts. Confucianism was established the orthodox thought of Chinese Empire by Emperor Wu of the Han Dynasty (141–87 BC), but Legalism also played a prominent role. Actually, the Chinese empire was considered a “Confucian-Legalist State.”¹¹⁵

Indeed, Confucianism and Legalism diverge over the means by which the state was governed. Legalism favored “statutes,” especially criminal laws. By contrast, Confucianism preferred “rites,” some of which were incorporated

¹⁰⁸ Wen Jiabao, “Turning Your Eyes to China,” December 11, 2003, Harvard University.

¹⁰⁹ “China has made remarkable progress, but remains ‘world’s largest developing nation’: President Xi,” available at <http://www.straitstimes.com/asia/east-asia/new-policy-agenda-leadership-team-in-spotlight-as-china-opens-19th-communist-party> (last visited March 20, 2018).

¹¹⁰ Report of the Secretary-General, Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels, A/66/749, March 16, 2012, at 2.

¹¹¹ Margaret Jane Radin, Reconsidering the Rule of Law, 69 *Buff. U. L. Rev.* 781, 791 (1989); Teemu Ruskola, *Legal Orientalism: China, The United States, and Modern Law* (Cambridge: Harvard University Press, 2013) 13.

¹¹² Randall Peerenboom, *China’s Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002) 3.

¹¹³ Randall Peerenboom, at 2.

¹¹⁴ Teemu Ruskola, at 14.

¹¹⁵ See generally Dingxin Zhao, *The Confucian-Legalist State: A New Theory of Chinese History* (Oxford: Oxford University Press, 2015).

in “statutes,” while some others existed in other forms (for instance, moral disciplines). The important thing, however, is both Confucianism and Legalism are based on paternalism.¹¹⁶ The assumption underlying that paternalism is that an emperor of the Chinese dynasty was a “Son of Heaven,” who, on behalf on “Heaven,” performed a “Mandate of Heaven.” Thus, an emperor was believed to be imbued with superior moral and epistemic authority over his subjects, who were considered “sons” of an emperor. Obviously, this paternalism is in conflict with three tenets of Western liberal tradition, that is, the normative equality premise; the epistemic equality premise; and the idea that the interests of individuals and state are not always reconcilable.¹¹⁷ Law thus is susceptible to abuse, which leads eventually to the rule of man. Nevertheless, there is some natural law or “higher law” thinking in ancient China. For instance, the “heavenly principles” (“Tian Li”) was considered “not much different than the natural proponents of the Western world.”¹¹⁸ This implies that it is not unlikely to introduce some Western legal conception in China.

The risk of rule of man inherent in Chinese traditional paternalism is exacerbated by the orthodox socialist legal theory. Socialist law, which had close connections with the civil law system¹¹⁹ and was once recognized as a third legal system in addition to the common law system and the civil law system,¹²⁰ posed challenges to the West world on “issues spanning the full breadth of the law.”¹²¹ Socialist legal philosophy was developed based on three basic tenets of Marxist theory: first, “the economic production and the social relationships constituted by it (the *Produktionsverhaeltnisse*) determine the coming into existence as well as the disappearance of state and law”; second, law, together with state, exists only if two “classes,” namely, the class of “exploiting owners of the means of production” and the class of “the exploited workers,” exist.¹²² In other words, there will be no law when the classes do not exist any longer. Third, as a corollary of the first and second, the law is an instrument to practice “class struggle.”¹²³ As a result, if a new instrument (especially, policy) is found

¹¹⁶ Randall Peerenboom, at 41.

¹¹⁷ *Id.*, at 41.

¹¹⁸ Caleb Wan, Confucianism and Higher Law Thinking in Ancient China, 10 *Regent J. Int’l L.* 77 (2013–2014) 77. See also Win-Tsit Chan, The Evolution of the Confucian Concept Jên, 4 *Phil. East & West* 295 (1955).

¹¹⁹ John Quigley, Socialist Law and the Civil Law Tradition, 37 *Am. J. Comp. L.* 781 (1989).

¹²⁰ See A. G. Chloros, Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought, 9 *Cambrian L. Rev.* 11 (1978).

¹²¹ John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: Cambridge University Press, 2007) 9.

¹²² Hans Kelsen, *The Communist Theory of Law* (New York: Frederick A. Praeger, Inc., 1955) 1.

¹²³ *Id.*, at 33.

as efficient as, or more efficient than, law, the law may readily be substituted by that instrument. As the socialist camp collapsed in 1989, however, former socialist states have largely turned to embrace Western conception of law and rule of law. Some commentators thus proclaimed that socialist law was “dead and buried.”¹²⁴ Other commentators suggested that legal systems would enter the era of “transnational harmonization” as capitalism swept the world.¹²⁵

Without any hesitation, the PRC accepted the orthodox socialist legal philosophy. As a matter of fact, the instrumentality of law was reflected in the interim constitution of the PRC, the Common Program (1949). It provided that “all laws, decrees and judicial systems of the Kuomintang reactionary government which oppress the people shall be abolished. Laws and decrees protecting the people shall be enacted and the people’s judicial system shall be established.”¹²⁶ After the founding of the PRC, the socialist law—from legal philosophy, to regimes, and to institutions—was systematically transplanted into China.¹²⁷ Soon after, a range of measures were taken to dismantle the so-called bourgeois legal order in order to establish a proletarian legal order.¹²⁸ Unfortunately, China entered into a long period of “lawlessness.”¹²⁹ Law, whatever it meant, could be “made” and “enforced” by anyone if he could hold power. As a matter of fact, Mao Zedong once publicly asserted that people should “[d]epend on the rule of man, not the rule of law.”¹³⁰

3.3.2 A Rule-of-Law State

The conception of rule of law was rejected in orthodox socialist legal philosophy. Instead, a conception of “socialist legality” was developed. This socialist legality differs from rule of law in that it subordinates law to the policy preference of the Communist Party.¹³¹ The rule of law was described as “an anti-scientific conception established in bourgeois legal literature, picturing the

¹²⁴ See Hein Kötz, Preface to the Third Edition, in Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford: Clarendon Press 3rd ed., Tony Weir trans., 1998) v.

¹²⁵ See Louis Del Duca, Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common Law and Civil Law Convergence, 42 *Tex. Int’l L.J.* 625 (2007).

¹²⁶ Common Program (1949), art. 17.

¹²⁷ William Partlett and Eric C. Ip, Is Socialist Law Really Dead?, 48 *N.Y.U. J. Int’l L. & Pol.* 463 (2015–2016) 475–476.

¹²⁸ See Shao-Chuan Leng, The Role of Law in the People’s Republic of China as Reflecting Mao Tse-Tung’s Influence, 68 *J. Crim. L. & Criminology* 356 (1973) 358–361.

¹²⁹ Laszlo Ladany, *Law and Legality in China, The Testament of a China-Watcher* (University of Hawaii Press, 1992) 52.

¹³⁰ Shao-Chuan Leng, at 356.

¹³¹ A. G. Chloros, Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought, 9 *Cambrian L. Rev.* 11 (1978) 24.

bourgeois state as if there is no room for arbitrary executive power and where allegedly law and legality reign.”¹³²

The state of “lawlessness” in China, which, as noted previously, began soon after the founding of the PRC in 1949, was finally terminated after Deng Xiaoping took power and the Reforming and Opening-up Policy started in the late 1970s. The Constitution (1982) provided that China should “improve legal systems”¹³³ and that “no organization or individual is privileged to be beyond the Constitution or law.”¹³⁴ In amending the Constitution (1982) in 1999, China, for the first time, pledged to “rule the state by law” and build a “socialist rule-of-law state.”¹³⁵ The year 2004 witnessed another important progress in terms of rule of law. China’s constitution, for the first time, stipulated that the state must be one that “respects and protects human rights.”¹³⁶ After President Xi Jinping took power in 2012, China announced that it would endeavor to comprehensively improve the rule of law in China. In 2014, the CCP adopted the Decision on Major Issues Concerning Comprehensively Enhancing to Rule the State by Law (“The CCP Rule-by-Law Decision (2014)”). This document blueprints a wide range of future measures planned in order to improve the integrity, efficiency, and professionalism of the legal system in China.¹³⁷

As China increases its engagement with Western countries and increasingly integrates into international order, China in many aspects has embraced the Western conception of rule of law.¹³⁸ As a matter of fact, China itself affirms that it “draws on good practices of rule-of-law in other countries.”¹³⁹ In reviewing profound legal changes in China since the late 1970s, Ruskola said that

[i]n many ways, they would seem to represent the triumph of the logic of legal Orientalism, which China slowly clearing away the obstacles posed by its (particular) political traditions to make way for law’s (universal) development—exemplified in turn by a U.S.-championed rule-of-law model as the new “standard of civilization”, the ultimate measure of constitutional fitness for inclusion in international society.¹⁴⁰

¹³² *Id.*

¹³³ Constitution (1982), Preamble.

¹³⁴ Constitution (1982), art. 5.

¹³⁵ Constitution (1982, as amended in 1999), art. 5(1).

¹³⁶ Constitution (1982, as amended in 2004), art. 33.

¹³⁷ See Central Committee of CCP, Decision on Major Issues Concerning Comprehensively Enhancing to Rule State by Law (October 23, 2014) (hereinafter, “The CCP Rule-by-Law Decision (2014)”), available at http://news.xinhuanet.com/2014-10/28/c_1113015330.htm.

¹³⁸ See Randall Peerenboom, at 56–62; Jianfu Chen, The Transformation of Chinese Law: From Formal to Substance, 37 *Hong Kong L.J.* 689 (2007) 736–737; Randall Peerenboom, Social Foundations of China’s Living Constitution, in *Comparative Constitution Design* (Tom Ginsburg ed., 2012) 138, 159–160, 163.

¹³⁹ The CCP Rule-by-Law Decision (2014), Part One.

¹⁴⁰ Teemu Ruskola, at 207.

During the more than two decades during which China has sought to resume normal legal order since the late 1970s, there were four major elements that formed the Chinese conception of rule by law: “there must be laws to rely on; where there are laws, they must be followed; law must be strictly enforced; and violations of laws must be corrected (“you fa ke yi, you fa bi yi, zhifa bi yan, weifa bi jiu”).”¹⁴¹ It should be stressed what is included in the heading of the CCP Rule-by-Law Decision (2014) is not rule of law but “rule by law.” It provides that “law shall be made in a scientific manner, law shall be strictly enforced by executive branch, law shall be fairly applied by judicial branch, and law shall be abided by all people(kexue lifa, yange zhifa, gongzheng shifa, quan mi shoufa).”¹⁴² Nevertheless, based on traditional conception of rule by law, the 2014 Rule-by-Law Decision adds an important element, namely, “law shall be made in a scientific manner,” which implies “good” laws. In other words, China has begun to recognize that meaningful rule of law could not but be based on “good” laws. Nevertheless, Chinese conception of rule of law is still distinct from that generally endorsed in the Western world. The first and foremost difference is that China continues to largely instrumentalize the law, which, as noted previously, is imbedded in orthodox socialist legal philosophy. It is thus understandable that China has developed a conception of “rule by law” in addition to rule of law. According to Tushnet, the rule by law means “there are some laws in place, whose content is reasonably clear and known to the people to whom the laws apply.” Therefore, a rule by law exists “when the laws in place are reliably applied.”¹⁴³ Obviously, China seeks to achieve rule of law through rule by law. However, the strong instrumentality inherent in rule by law might make law susceptible to be created, amended, and applied out of narrow or illegitimate considerations of government. A commentator thus suggested that rule by law may “kill” rule of law.¹⁴⁴

The second difference concerns the role of the CCP in Chinese rule of law. The CCP Rule-of-Law Decision (2014) unequivocally states that socialist rule of law “must adhere to the CCP’s leadership.”¹⁴⁵ Furthermore, Chinese particular circumstances and experience are required to be taken into account in the building of Chinese rule of law.¹⁴⁶ Thus, it is expected that China cannot fully embrace Western legal conception. As a matter of fact, the CCP Rule-by-Law Decision (2014) announced that “China by no means copy the ideology and

¹⁴¹ See Randall Peerenboom, at 57.

¹⁴² The CCP Rule-by-Law Decision (2014), Part One.

¹⁴³ Mark Tushnet, Rule by Law or Rule of Law?, 22 *Asia-Pac. L. Rev.* 79 (2014) 80.

¹⁴⁴ See generally Ratna Rueban Balasubramaniam, Has Rule by Law Killed the Rule of Law in Malaysia?, 8 *Oxford U. Comm V. L.J.* 211 (2008).

¹⁴⁵ 2014 Rule-by-Law Decision, Part One.

¹⁴⁶ See Randall Peerenboom, at 158–163.

conception of rule-of-law in other countries.”¹⁴⁷ Some Western observers thus argued that there is merely “thin” rule of law in China.¹⁴⁸

Therefore, it is safe to say that socialist law has not been “dead” in China, and that socialist legal philosophy “continues to play, a larger role in Chinese public law development than previously acknowledged.”¹⁴⁹ Actually, as China surprises international society with its marvelous development, and as China appears unlikely to fully embrace a Western liberal democratic conception of rule of law, some Western lawyers have taken to suggesting that Western countries should reconceptualize the rule of law. For instance, Randall Peerenboom is of the opinion that Western countries “need to theorize rule of law in ways that do not assume a liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China’s own circumstances.”¹⁵⁰ Teemu Ruskola wondered a possibility that an “legal orientalism” would be replaced with “oriental legalism.”¹⁵¹ He, while having the expectation that perhaps China would one day “submit to rule-of-law in its modern Euro-American form,” suggested that China might also “recast law’s rule in the form of an evolving Chinese universalism—an Oriental legalism.”¹⁵² Ruskola argued that “[i]f law can resignify China, we must be prepared to accept that China can also Signify law.”¹⁵³ In a word, China might somewhat reshape the Western conception of law and rule of law.

3.4 From a Falling Civilized State to a Renascent Civilized State

Civilization refers to the “overall way of life” of a people and involves “values, norms, institutions, and modes of thinking to which successive generations in a given society have attached primary importance.”¹⁵⁴ From the historical perspective, early international law was fundamentally influenced by Christian civilization.¹⁵⁵ Christian civilization provided ideological and normative sources for international law. In particular, Christian civilization helped justify the colonial expansions by European powers. For instance, Pope Alexander VI’s Papal

¹⁴⁷ 2014 Rule-by-Law Decision, Part One.

¹⁴⁸ See Randall Peerenboom, at 3, 64–65.

¹⁴⁹ William Partlett and Eric C. Ip, at 479–480.

¹⁵⁰ Randall Peerenboom, at 5. See also Teemu Ruskola, at 233.

¹⁵¹ Teemu Ruskola, at 232.

¹⁵² *Id.*, at 233.

¹⁵³ *Id.*, at 233.

¹⁵⁴ Samuel P. Huntington, at 41.

¹⁵⁵ See generally John Eppstein, *The Catholic Tradition of International Law* (New Jersey: The Lawbook Exchange Ltd., 2008).

Bull divided the world into Spanish and Portuguese spheres.¹⁵⁶ On the other hand, civilization was often closely intertwined with national interests. R. P. Anand rightly suggested that the impact of the cultural background of a state on its international legal practice “must not be exaggerated.”¹⁵⁷ He argued that divergent actions by states can be explained by a conflict of interests rather than merely by their culture and religions.¹⁵⁸

After the first non-Christian state, namely, the Ottoman Empire, was recognized as a member of international society in the nineteenth century,¹⁵⁹ civilization began to reduce its importance in international law. Furthermore, civilization, in most of the twentieth century, was not an important issue in international relations. However, civilization became a focus again in international relations in the wake of the Cold War. According to Samuel P. Huntington, the world after the Cold War for the first time has become multicivilizational. He argued that the most important distinctions among peoples are cultural, not ideological, political, or economic any longer, and that the most influential groupings of states are seven or eight major civilizations, and no longer the Western states, socialist states, and the Third World states during the period of Cold World.¹⁶⁰ Huntington warned that, as non-Western civilizations rise, the “clash of civilizations” would become a new fundamental variable in the “making of world order”¹⁶¹ and that potential clashes would mainly occur between Christian civilization and Islamic civilization,¹⁶² and between Christian civilization and Chinese civilization. Huntington assumed that Islam would be a source of many “small fault line wars,” while the rise of China would be the potential source of “a big intercivilizational war of core states.”¹⁶³ Implicit in Huntington’s theory is that China will be the most dangerous source of the clash of civilizations. Huntington’s theory is open to debate, however. Indeed, Huntington mentioned several elements of Chinese civilization, for instance, hierarchy, the subordination of individual rights, and interests to that of

¹⁵⁶ See Wilhelm G. Grewe, at 229–249; Antony Anghie, at 17.

¹⁵⁷ R. P. Anand, *New States and International Law* (Gurgaon: Hope India Publications, 2nd ed., 2008) 50.

¹⁵⁸ R. P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, in Frederick E. Snyder and Surakiart Sathirathai eds., *Third World Attitudes Toward International Law* (Dordrecht: Martinus Nijhoff Publishers, 1987) 17.

¹⁵⁹ Gerrit W. Gong, at 106–118.

¹⁶⁰ Samuel P. Huntington, at 21.

¹⁶¹ *Id.*, Part IV.

¹⁶² *Id.*, at Chapter 9. See also Shireen T. Hunter, *The Future of Islam and the West: Clash of Civilizations or Peaceful Coexistence?* (Westport: Praeger, 1998); Wolfgang Zank ed., *Clash or Cooperation of Civilization?* (Burlington: ASGATE, 2009); Gabriel A. Acevedo, *Islamic Fatalism and the Clash of Civilizations: An Appraisal of a Contentious and Dubious Theory*, 86 *Soc. F.* 1711 (2007–2008).

¹⁶³ Samuel P. Huntington, at 209.

states, the pursuit of consensus, the avoidance of confrontation, “saving face,” and the importance placed on long-term gains.¹⁶⁴ Unfortunately, I must say that Huntington largely misunderstood or distorted Chinese civilization. For instance, Huntington did not explain at all why the pursuit of consensus would cause a clash of civilizations. Huntington was also blind to several fundamental constituent concepts in Chinese civilization, especially, the tradition of pacifism.¹⁶⁵ To be frank, what Huntington discussed about the relationship between China and the U.S. largely concerned the clash of interests of the two states instead of the clash of civilization.

That being said, Huntington is right in noting the fact that non-Christian civilizations are on the rise while international society enters an era of multicivilizations in the wake of the Cold War. In particular, conflicts between Christian civilization and Islamic civilization tend to increase. Indeed, how to manage the relationship between civilizations has become an important agenda for international society. In 1998 the UN announced that 2001 would be the UN Year of Dialogue of Civilizations.¹⁶⁶ In 2001, the UN General Assembly adopted the Resolution of Global Agenda for Dialogue among Civilizations.¹⁶⁷ The resolution notes that the globalization “presents the challenge of preserving and celebrating the rich intellectual and cultural diversity of humankind and of civilization.” Dialogues among civilizations are designed to attain, *inter alia*, “promotion of inclusion, equity, equality, justice and tolerance in human interactions”; “mutual enrichment and advancement of knowledge and appreciation of the richness and wisdom found in all civilizations”; “identification and promotion of common ground among civilizations in order to address common challenges threatening shared values, universal human rights and achievements of human society in various fields”; “enhancement of respect for cultural diversity and cultural heritage.”¹⁶⁸ To that end, such dialogues should abide by principles of, *inter alia*, “recognition of diversified sources of knowledge and cultural diversity as fundamental features of human society . . .”; “recognition of the right of members of all civilizations to preserve and develop their cultural heritage within their own societies.”¹⁶⁹ In the era of multicivilizations, there may be many possibilities which include both potential clashes, as warned about by Huntington, and coexistence and cooperation, as encouraged by the UN. Given that Christian civilization was dominant in most of the time in the modern world, it is suggested that whether the interactions

¹⁶⁴ *Id.*, at 225.

¹⁶⁵ The State Council Information Office (China), White Paper on China's Peaceful Development Road (September 2011) (hereinafter “China's Peaceful Development Road (2011)”), Part IV.

¹⁶⁶ United Nations Year of Dialogue among Civilizations, A/RES/53/22, November 4, 1998.

¹⁶⁷ Global Agenda for Dialogue among Civilizations, A/RES/56/6, November 21, 2001, Preamble.

¹⁶⁸ *Id.*, art. 2.

¹⁶⁹ *Id.*, art. 3.

between civilizations move toward clash or cooperation largely depends on whether non-Christian civilizations could be well understood and respected.

3.4.1 A Falling State of Civilization

Chinese civilization or “Sinic” has been recognized as one of main civilizations in the world. Geographically, it is not confined to China. Rather, East Asia and Southeast Asia were traditionally believed within the sphere of Chinese civilization. Confucianism is a major component of Chinese civilization, but Chinese civilization also includes Legalism and Taoism, and so on.¹⁷⁰ From the mid-seventeenth to the mid-eighteenth century, European intellectuals “transformed China into a political utopia and the ideal state of an enlightened absolutism.”¹⁷¹ For instance, Leibniz wrote that “their [Chinese] language and character, their way of life, their crafts and manufactures, even their games, are almost entirely different from ours, as if they were a people from a different globe.”¹⁷² Against Chinese civilization, Leibniz was surprised “all the time to see how much we lack, and how much could be added to our practice in the most useful things in life, or the most necessary, in regard to numbers, figures, machines, navigation, military science, geography, etc.”¹⁷³ For Leibniz, Chinese civilization “would be more useful than all the customs and all the artifacts of the Greeks and Romans.”¹⁷⁴ After knowing that the Chinese had begun to learn Western civilization, Leibniz warned, “I fear that one day when the Chinese have learned our sciences, they will expel the Europeans. Consequently, I believe, that one should not lose the opportunity to make up for it by conducting an exchange of their knowledge for ours.”¹⁷⁵ However, this admirable image of Chinese civilization has been reversed since the late eighteenth century. Kant started a movement of critiques of Chinese civilization in Europe. Kant fiercely attacked Chinese religion, metaphysics, and ethics. For instance, Kant believed that the belief in God, albeit unprovable, was indispensable for practicing reason, morality, and ethics, but he found that many Chinese did not believe in God and did not take religion seriously.¹⁷⁶ The move of criticisms on Chinese civilization culminated in Hegel. Hegel satirized that the theory of Confucius,

¹⁷⁰ See generally Fung Yu-lang, *A Short History of Chinese Philosophy* (New York: The Free Press, 1948, Derk Bodde ed.); Karyn L. Lai, *An Introduction to Chinese Philosophy* (Cambridge: Cambridge University Press 2008).

¹⁷¹ See Thomas Fuchs, The European China-Receptions from Leibniz to Kant, 33 *J. Chinese Phil.* 35 (2006) 43; Xiping Zhang ed., *Chinese Elements in Leibniz's Thought* (Zhengzhou: Daxiang Press, 2010) (in Chinese).

¹⁷² Citing from William Jones, Leibniz's “Community of Common Destiny,” *EIR* (2017) 18.

¹⁷³ *Id.*, at 17.

¹⁷⁴ *Id.*, at 18.

¹⁷⁵ *Id.*, at 18.

¹⁷⁶ Gregory M. Reihman, Categorically Defined: Kant's Criticism of Chinese Philosophy, *J. Chinese* 51 (2006) 51–59.

the most influential thinker of China, merely provided a good understanding of the affairs of man, but “one looks in vain for speculative philosophy in Confucius’ works, for he was merely a practical statesman.”¹⁷⁷ While important, the fall of Chinese civilization is not attributable to critical writing or Kant and Hegel, and so on, but to intercourses between China and Western powers since the nineteenth century. China’s conception of hierarchy, standard of justice, denial of free trade, and so on were found to squarely contradict core tenets of European civilization.¹⁷⁸ In order to “civilize” China, Western powers waged wars (for instance, the Opium War (1839)), thereby forcing China to conclude “unequal treaties” (for instance, the Nanking Treaty (1842)) since the 1840s or so. As a result, China was degraded as an “uncivilized” state.

Since the mid-eighteenth century, many initiatives to incorporate the “standards” of European civilization were proposed aiming to reconstruct Chinese civilization, but the Imperialist Qing Dynasty still wanted to maintain Chinese civilization. The Imperialist Qing Dynasty insisted on a principle of “Chinese studies at the base, Western studies for practical use (“Zhong Ti Xi Yong”).” “Chinese studies” generally refers to “traditional Chinese political and economic systems and their corresponding ideologies,” while “Western studies” was confined to “Western science and technology,” not including Western institutions (especially political institutions) and thoughts.¹⁷⁹ After the ROC, the first republican state in Asia, was founded in 1911, some elements of Western civilization, for instance, equality, human rights, and religions, were gradually introduced to China, but they were ill practiced. On the other hand, many components of Chinese civilization, especially “Rites,” (for instance, “the Three Cardinal guides”—“ruler guides subject, father guides son, and husband guides wife”¹⁸⁰) were fiercely assaulted.¹⁸¹

More fundamental attacks on Chinese civilization came from Chinese Communists. As Confucianism was the orthodox ideology of Chinese feudal dynasties,¹⁸² the CCP, in reliance on socialist ideology, set its target against Confucianism since its founding in 1921. The founding of the PRC was hailed to represent a “great victory” against feudalism.¹⁸³ The PRC launched another

¹⁷⁷ Young Kun Kim, Hegel’s Criticism of Chinese Philosophy, 28 *Phil. East & West* 173(1978) 173–174.

¹⁷⁸ Gerrit W. Gong, at 137.

¹⁷⁹ Shogo Suzuki, *Civilization and Empire: China and Japan’s Encounter with European International Society* (Florence: Routledge, 2009) 92–95.

¹⁸⁰ Jifang Zhang, *The Tradition and Modern Transition of Chinese Law* (Verlag: Springer, 2014) 26.

¹⁸¹ *Id.*, at 518–520; “May Fourth Movement,” available at <https://www.britannica.com/event/May-Fourth-Movement>.

¹⁸² See generally Dingxin Zhao, *The Confucian-Legalist State: A New Theory of Chinese History* (Oxford: Oxford University Press, 2015).

¹⁸³ See Common Program, Preamble. See also Constitution (1954), Preamble.

wave of attacks on Confucianism since the mid-1950s.¹⁸⁴ Importantly, in the 1980s, Chinese liberals who emerged when China implemented the Reforming and Opening-up Policy delivered, in reliance on Western liberty and democracy, yet another blow to Chinese traditional civilization. A far-reaching intellectual event is the production of *River Elegy*, a fashionable documentary shown on China Central Television (CCTV) in 1988, which, through the prism of Western civilization, portrayed “the decline of traditional Chinese culture.”¹⁸⁵

In short, Chinese traditional civilization was assumed by many Chinese to be the main cause of the century of humiliations that China experienced since the mid-nineteenth century. As a result, the twentieth century witnessed a “one-century” critique of traditional Chinese civilization.

3.4.2 A Reviving State of Civilization

Interestingly, China, in the Constitution (1982), pledged to develop into a socialist state with a “highly advanced civilization.”¹⁸⁶ This ambition was later modified to read an “advanced civilization” in 1993.¹⁸⁷ Since the CCP had been critical of traditional Confucianism and the Constitution (1982) stressed China’s socialist identity, it is fair to assume that China, in constructing socialist civilization, had no intention to attach much on Chinese traditional civilization.¹⁸⁸

Since the 1990s, however, the one-century critique of its own traditional civilization has significantly ebbed in China. Instead, China has begun to argue that Chinese traditional civilization is helpful to enhance national development and harmonize social relations. In particular, it is seen as offering help to address some serious problems emerging in China’s political, economic, and social transition. For instance, many Chinese companies are greedy for economic profits with little regard for public interest (for instance, environmental protection). “Harmony,” a fundamental element that characterizes Chinese traditional civilization,¹⁸⁹ was believed to help to reduce confrontation between persons, keeping a sustainable relationship between mankind and nature. In 2004,

¹⁸⁴ See, e.g., Merle Goldman, China’s Anti-Confucian Campaign, 1973–74, 1975 *China Q.* 435 (1975).

¹⁸⁵ “River Elegy,” available at https://en.wikipedia.org/wiki/River_Elegy (last visited March 20, 2018).

¹⁸⁶ Constitution (1982), Preamble.

¹⁸⁷ Constitution (1982, as amended in 1993), Preamble. See also Constitution (1982, as amended in 2004), Preamble.

¹⁸⁸ “Socialist spiritual civilization,” in *Encyclopedia of Contemporary Chinese Culture*, available at https://contemporary_chinese_culture.academic.ru/713/socialist_spiritual_civilization (last visited March 20, 2018).

¹⁸⁹ Rosita Dellios and R. James Ferguson, *China’s Quest for Global Order: From Peaceful Rise to Harmonious World* (Lanham: Lexington Books, 2013) 11–36.

then President Hu Jintao stated that China would develop into a “Socialist Harmonious Society,”¹⁹⁰ which was affirmed by the CCP and the National People’s Congress (NPC) in 2006.¹⁹¹ The affirmation of the importance of the concept of “harmony” demonstrates that the traditional civilization is relevant in contemporary China.¹⁹² President Xi Jinping refined his Theory of Three Self-Confidences by proposing a new “Cultural self-confidence.” According to Xi, Cultural Self-Confidence is “more of a basic, profound and enduring confidence.”¹⁹³ It is suggested that the CCP seeks, in addition to socialist ideology and economic development, new sources of legitimacy for its ruling from Chinese cultural nationalism.¹⁹⁴ China has also made efforts to exhibit the charm of Chinese civilization in the past decade at an international level. For instance, as of 2017 China has financed more than 500 Confucius institutes and more than 1,000 Confucian classes in over 140 states to promote Chinese traditional culture.¹⁹⁵ Chinese civilization arguably becomes a major source of soft power for China.¹⁹⁶

3.5. The Identification of China’s Identity: Strategy and Methodology

As illustrated by the theories of identity introduced at the beginning of this chapter, the identity China seeks to assert, either internally or in its relations with other countries, is impacted by multiple calculations, and thus there are disagreements on which identity of China should be claimed. For China, there appear two major considerations in determining which state identity it should assert. First, the goal is to expand rising Chinese power as much as possible. Second, it should reduce obstacles to the rise of China as much as possible.

¹⁹⁰ “Harmonious society,” available at http://cpcchina.chinadaily.com.cn/2010-09/16/content_13918117.htm (last visited March 20, 2018).

¹⁹¹ *Decision on Major Issues Concerning the Construction of a Socialist Harmonious Society*, available at <http://cpc.people.com.cn/GB/64093/64094/4932424.html>; Eleventh Five-Year Plan (FYP, 2006–2010), available at <http://www.chinanews.com/news/2006/2006-03-16/8/704079.shtml> (last visited January 10, 2018).

¹⁹² Rosita Dellios and R. James Ferguson, at 5.

¹⁹³ “Cultural confidence becomes new buzz words,” available at <http://english.cctv.com/2016/07/21/ARTI8yXZ2iF1htJyqBskYBXs160721.shtml> (last visited March 2018).

¹⁹⁴ Yingjie Guo, “The CCP returns to Chinese cultural roots,” available at <http://www.eastasiaforum.org/2016/10/03/the-ccp-returns-to-chinese-cultural-roots/> (last visited March 20, 2018).

¹⁹⁵ “About Confucius institutes and classes,” available at http://www.hanban.edu.cn/confuciusinstitutes/node_10961.htm (last visited January 18, 2018).

¹⁹⁶ R. S. Zaharna, Jennifer Hubbert, and Falk Hartig, *Confucius Institutes and the Globalization of China’s Soft Power* (Los Angeles: Figueroa Press, 2014).

Currently, the identification of China's state identity centers on whether China should be still treated as a developing nation. China takes note of a trend among states that China should not be identified a developing nation as it claims. In 2013, Wang Yang, China's vice premier, wrote that

as national comprehensive power expands, China's power of discourse and influence in international economic governance gradually increases . . . some developed countries make more demands on China . . . some developing countries have also more expectations on China. The basic fact that China is at the preliminary stage of socialism and a largest developing country will remain for a long period. The gap between the cognition of the outside world and real China causes troubles on China's participation on international economic cooperation.¹⁹⁷

For China's part, the claiming of identity of developing country entitles it to some privileges in the forms of either enjoyment of preferential rights or waiver of obligations which are granted to developing countries under specific international regimes, for instance, WTO regime. In order to convince other countries that China is still a developing country, China mainly employs the methodology of calculating "per capita," which was employed by, for instance, then Premier Wen Jiabo in his speech of "Turning Your Eye to China" delivered in 2003 at Harvard University. This calculation is likely beneficial because China might be required to bear more obligations if it is identified as a developed country or great power. However, some countries assert that China is no longer a developing country as China claims. These countries seem to employ the methodology of "as a whole." For instance, President Donald Trump complains that China's developing country status is "unfair" because China, as a state, is a great economic power.¹⁹⁸ On January 15, 2019, the U.S. submitted to the WTO General Council a proposal of identifying the developing states, which is clearly based on the methodology of "as a whole."¹⁹⁹

In a similar vein to stressing its identity as a developing nation instead of a developed nation, as illustrated later, in recent years China has tended to highlight its traditional civilization. China stresses the pacifism and inclusiveness inherent in Chinese civilization, which is arguably purported to assure other

¹⁹⁷ Yang Wang, To Construct Open-Oriented New Economic Regime, *People's Daily*, November 22, 2013 (in Chinese).

¹⁹⁸ "Trump slams WTO for allowing China to be considered a developing country," available at <https://insidetrade.com/trade/trump-slams-wto-allowing-china-be-considered-developing-country> (last visited March 20, 2018).

¹⁹⁹ An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance, Communication from the United States, January 16, 2019, WT/GC/W/757.

countries that the conventional thinking of the rise and fall of great powers in history does not apply to China's rise. China's Peaceful Development Road (2011) states that "we sincerely hope that the international community will have a deeper appreciation of China's time-honored cultural traditions."²⁰⁰ By contrast, some people take note of the hierarchy and the attendant tributary system in Chinese traditional civilization, which conflicts with the principle of sovereign equality in international law. This hierarchal theme is presumably considered a main source of potential clash between Chinese civilization and Christian civilization.²⁰¹

4. Relationship between the Change of China's State Identity and the Development of Chinese International Legal Policies

4.1. Conventional Thinking

As suggested in *The Rise and Fall of the Great Powers* (1986) by Paul Kennedy, the conventional thinking as to the change of state identity and state behavior is clear: new great powers will inevitably seek to challenge and reshape the international order, which has been established and maintained by old great powers.

John J. Mearsheimer, a self-proclaimed aggressive realist, applied this conventional thinking to the rise of China. Mearsheimer predicted that a rising China "might be far more powerful and dangerous than any of the potential hegemons" that the U.S. faced in the twentieth century and that China "would not be a status quo power but an aggressive state determined to achieve regional hegemony." As a response, the U.S. should "reverse" its policy of engagement and "do what it can to slow the rise of China." He argued that the U.S. "has taken the first steps in this direction."²⁰² Some commentators have used the term "Thucydides's trap" to examine the China-U.S. relationship.²⁰³ Apparently, the U.S. government has approved of this conventional thinking. In the National Security Strategy issued in December 2017, the U.S. identifies China together with Russia as "revisionist powers."²⁰⁴ The U.S. warns that China and

²⁰⁰ China's Peaceful Development Road (2011), Part IV.

²⁰¹ Samuel P. Huntington, at 225. See also William A. Callahan, Chinese Vision of World Order: Post-hegemonic or a New Hegemony?, 10 *Int'l Stud. Rev.* 749 (2008); Suisheng Zhao, Rethinking the Chinese World Order: The Imperial Cycle and the Rise of China, 24 *J. Contemp. China* 961 (2015).

²⁰² John J. Mearsheimer, at 401–402.

²⁰³ See, e.g., Graham Allison, Thucydides's Trap Has Been Sprung in the Pacific, *Financial Times*, August 22, 2012.

²⁰⁴ *National Security Strategy of the United States of America*, December 2015, at 25.

Russia “challenge American power, influence and interests, attempting to erode American security and prosperity”²⁰⁵ and that they “want to shape [a] world antithetical to U.S. values and interests.”²⁰⁶

It seems that some international lawyers have also endorsed the conventional thinking. Eric A. Posner and John Yoo suggested that conflicts between China and the U.S. would likely be expected and that current international legal regimes were too weak to manage them. Therefore, they supported the U.S.’s efforts to create another version of NATO around China to contain the rise of China.²⁰⁷

China does not deny the existence of this conventional thinking. China notes that “[i]n modern history, some rising powers established colonies, fought for spheres of influence, and conducted military expansion against other countries. This reached climax in the 20th century, when rivalry for hegemony and military confrontation plunged mankind into the abyss of two devastating world wars.”²⁰⁸ China’s Foreign Minister Wang Yi also pointed out that “historically, it seemed inevitable for major countries, especially emerging powers and established powers, to engage in competition and end up in confrontation or even conflict.”²⁰⁹ Although he argued that “[t]here is no such thing as the so-called Thucydides trap in the world,” President Xi Jinping also warned, “But should major countries time and again make the mistakes of strategic miscalculation, they might create such traps for themselves.”²¹⁰

4.2. China’s Reply to Conventional Thinking

China long proclaimed that it would be an exception to the conventional thinking. As early as 1974 when, in delivering his speech before the UN General Assembly, Deng Xiaoping stated that

China is not a superpower, nor will she ever seek to be one. What is a superpower? A superpower is an imperialist country which everywhere subjects other countries to its aggression, interference, control, subversion or plunder and strives for world hegemony. If capitalism is restored in a big socialist

²⁰⁵ *Id.*, at 2.

²⁰⁶ *Id.*, at 25.

²⁰⁷ Eric A. Posner and John Yoo, at 15.

²⁰⁸ China’s Peaceful Development (2011), Part V.

²⁰⁹ Wang Yi, “Exploring the Path of Major-Country Diplomacy with Chinese Characteristics” (June 27, 2013), available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1053908.shtml (last visited January 19, 2018).

²¹⁰ Full Text: President Xi’s speech on China-US ties, available at http://www.chinadaily.com.cn/world/2015xivisit/2015-09/24/content_21964069_3.htm (last visited March 20, 2018).

country, it will inevitably become a superpower . . . If one day China should change her colour and turn into a superpower, if she too should play the tyrant in the world, and everywhere subject others to her bullying, aggression and exploitation, the people of the world should identify her as social-imperialism, expose it, oppose it and work together with the Chinese people to overthrow it.²¹¹

In 1978, Deng Xiaoping gave a more detailed explanation. He said that

[a]s a socialist country, China shall always belong to the Third World and shall never seek hegemony. This idea is understandable since China is still quite poor, and is therefore a Third World country in the real sense of the term. The question is whether or not China will practise hegemony when it becomes more developed in the future. My friends, you are younger than I, so you will be able to see for yourselves what happens at that time. If it remains a socialist country, China will not practise hegemony and it will still belong to the Third World. Should China become arrogant, however, act like an overlord and give orders to the world, it would no longer be considered a Third World country. Indeed, it would cease to be a socialist country.²¹²

In the late 1970s, China's priority was to restore its own political, economic, social, and legal order. It had neither the aspiration nor power to compete for hegemony with either the U.S. or the USSR. Therefore, although China's declarations of not seeking hegemony were unequivocal, they were merely rhetorical without the meaningful possibility of becoming reality. A primary purpose of those declarations was to ideologically assault the "socialist imperialism" of the USSR. Actually, Deng did not explain several crucial issues with his proclamations. For instance, why could the socialist identity prevent China from competing for hegemony? Why could China belong to the Third World forever? Or more generally, why could China be an exception to the "iron law" of the rise and fall of great powers? Notwithstanding their weakness and position as pure rhetoric, these declarations were of significance in that the thoughts of Deng, the General Designer of China's Reforming and Opening-up Policy, were highly respected and maintained by his successors. In other words, although those declarations were rhetorical in the era of Deng Xiaoping, they may have enduring bearing on Chinese foreign policy in coming decades.

²¹¹ Speech by Chairman of the Delegation of the People's Republic of China, Deng Xiaoping, At the Special Session of the U.N. General Assembly, April 10, 1974.

²¹² Literature Office of the Central Committee of the CCP ed., *Selected Works of Deng Xiaoping* (Vol. 2) (Beijing: People's Press, 2nd ed., 1994), 112 (in Chinese).

As China dramatically expands its state power, whether the conventional thinking or Deng's thoughts of China's identity still apply to a rising China rises has become a real challenge for international society. To date, China maintains Deng's thoughts. For instance, in delivering his speech at Harvard University in 2003, the then premier stressed that the rise of China would be "peaceful," which aimed to rebut a proposition of "China's threat theory" which began to emerge in some Western countries since the 1990s.²¹³ Furthermore, in China's Peaceful Development Road (2011), China stated that the rise of China "has broken away from the traditional pattern where a rising power was bound to seek hegemony" and urged that "the international community should reject the zero-sum game which was a product of the old international relations, the dangerous cold and hot war mentality, and all those beaten tracks which repeatedly led mankind to confrontation and war."²¹⁴ China pledges that China's rise "will never pose a threat to anyone; instead, it can bring more development opportunities and bigger markets for the rest of the world."²¹⁵

Furthermore, China goes further to explain why the conventional thinking did not apply to China. At a press conference held by the NPC in March 2004, then Premier Wen Jiabo provided a lengthy explanation of China's Peaceful Rise. When talking about the influence of China's rise, Premier Wen said:

Firstly, in promoting China's peaceful rise, we must take full advantage of the very good opportunity of world peace to endeavor to develop and strengthen ourselves, and at the same time safeguard world peace with our own development. Secondly, the rise of China can only be based on our own strength and on our independent, self-reliant and hard efforts. It also has to be based on the broad market of China, the abundant human resources and capital reserves as well as the innovation of our systems as a result of reform. Thirdly, China's rise could not be achieved without the rest of the world. We must always maintain the opening up policy and develop economic and trade exchanges with all friendly countries on the basis of equality and mutual benefit. Fourthly, China's rise will require a long period of time and probably the hard work of many generations of Chinese people. Fifthly, the rise of China will not stand in the way of any other country or pose a threat to any other country, or be achieved at the expense of any particular nation. China does not seek

²¹³ Bonnie S. Glaser and Evan S. Mederos, The Changing Ecology of Foreign Policy-Making in China: The Ascension and Demise of the Theory of "Peaceful Rise," 190 *China Q.* 291 (2007).

²¹⁴ China's Peaceful Development Road (2011), Part IV.

²¹⁵ China's Peaceful Development Road (2005), Part I.

hegemony now. Nor will we ever seek hegemony even after China becomes more powerful.²¹⁶

Indeed, Premier Wen gave several reasons to support China's proclamation that the conventional thinking did not apply to China's rise. For instance, that China has a very large domestic market reduces the risk of mercantilism compared to great powers in history, like the U.K., which, given a narrow domestic market, and so on, had to compete for a global market and to do so established a global colonial empire.²¹⁷

It appeared, however, that Premier Wen's explanation did not relieve the anxieties of many people regarding China's self-proclaimed "peaceful rise" because an unexpected event occurred soon after. In his keynote speech given at Bo'ao Asia Forum in April 2004, then President Hu Jintao mentioned "peaceful development" rather than "peaceful rise."²¹⁸ The change was further confirmed in the China's first white paper on the Path to Peaceful Development Road (2005) ("China's Peaceful Development Road (2005)").²¹⁹ From then on, "peaceful rising" no longer appeared in official documents in China. Any explanation for this change was not released, but several commentators suggested potential reasons for the "demise" of the Chinese discourse of "Peaceful Rise."²²⁰ It seems that China recognized that the word "rise" intensified the anxieties of some countries toward what an increasingly powerful China would bring about, even though what China wanted to stress was simply that it would be a great power unlike traditional great powers in the history. However, both "Peaceful Rise" and "Peaceful Development" carry the same message that China's growing power will not be threatening to the outside world.

China's government, in China's Peaceful Development Road (2005) officially explained why the conventional thinking of the rise of great power did not apply to China's rise.²²¹ Three factors identified in that document include:

²¹⁶ Premier Wen Jiabo's press conference at the conclusion of the second session of the Tenth National People's Congress (March 15, 2004), available at <http://www.fmprc.gov.cn/eng/topics/lianghuizhuanti/t80119.htm> (last visited January 19, 2018).

²¹⁷ Mónica Garia-Salmones Rovira, *The Projects of Positivism in International Law* (Oxford: Oxford University Press, 2013) Chapters 2 and 3. See also Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge: Harvard University Press, 2016).

²¹⁸ Hu Jintao, China's Development Is an Opportunity for Asia (April 2004), available at <http://www.china.org.cn/english/features/93897.htm> (last visited March 20, 2018).

²¹⁹ The State Council Information Office (China), China's Peaceful Development Road, December, 2005.

²²⁰ They include: (1) it will weaken China's ability to deter Taiwan independence; (2) China's peaceful rise may not be possible; (3) it will intensify concerns among China's neighbors; (4) it is premature to discuss China's rise; (5) it is contrary to Deng Xiaoping's guidance on foreign affairs; (6) it could undermine support for military modernization; (7) it could incite domestic nationalism. Bonnie S. Glaser and Evan S. Mederos, at 302–306.

²²¹ China's Peaceful Development Road (2005), Part I.

(1) China suffered from successive wars and unrests since the nineteenth century, and it needs a long, peaceful period to build itself into a developed country;²²² (2) there is a pacifist tradition within Chinese civilization;²²³ and (3) today's world is characterized by power diffusion, increasing common interests, common challenges, and so on. Thus, China cannot but coexist and cooperate with other countries.²²⁴ The three factors were reaffirmed in China's Peaceful Development Road (2011). A major difference between the two documents is that Chinese traditional civilization was elaborated as the first factor in China's Peaceful Development Road (2011).²²⁵ China's Peaceful Development Road (2011) states that a rising China inherits "Chinese culture of over 5,000 years."²²⁶

²²² "It is an inevitable choice based on its national conditions that China persists unswervingly in taking the road of peaceful development. During the 100-odd years following the Opium War in 1840, China suffered humiliation and insult from big powers. And thus, ever since the advent of modern times, it has become the assiduously sought goal of the Chinese people to eliminate war, maintain peace, and build a country of independence and prosperity, and a comfortable and happy life for the people. Although it has made enormous achievements in development, China, with a large population, a weak economic foundation and unbalanced development, is still the largest developing country in the world. It is the central task of China to promote economic and social development while continuously improving its people's life. To stick to the road of peaceful development is the inevitable way for China to attain national prosperity and strength, and its people's happiness. What the Chinese people need and cherish most is a peaceful international environment. They are willing to do their best to make energetic contributions for the common development of all countries." *Id.* See also China's Peaceful Development Road (2005), Part IV.

²²³ "It is an inevitable choice based on China's historical and cultural tradition that China persists unswervingly in taking the road of peaceful development. The Chinese nation has always been a peace-loving one. Chinese culture is a pacific culture. The spirit of the Chinese people has always featured their longing for peace and pursuit of harmony. Six hundred years ago, Zheng He (1371–1435), the famous navigator of the Ming Dynasty, led the then largest fleet in the world and made seven voyages to the 'Western Seas,' reaching more than 30 countries and regions in Asia and Africa. What he took to the places he visited were tea, chinaware, silk and technology, but did not occupy an inch of any other's land. What he brought to the outside world was peace and civilization, which fully reflects the good faith of the ancient Chinese people in strengthening exchanges with relevant countries and their peoples." *Id.* See also China's Peaceful Development Road (2011), Part IV.

²²⁴ "It is an inevitable choice based on the present world development trend that China persists unswervingly in taking the road of peaceful development. It is the common wish of the people throughout the world and an irresistible historical trend to pursue peace, promote development and seek cooperation. In particular, further development of multi-polarization and economic globalization has brought new opportunities for world peace and development, and thus it is possible to strive for a long-term peaceful international environment. Meanwhile, China is clearly aware that the world is still troubled by many factors of instability and uncertainty, and mankind still faces many severe challenges. However, there are more opportunities than challenges, and as long as all countries work together we can gradually attain the goal of building a harmonious world of sustained peace and common prosperity. For many years, China has consistently followed an independent foreign policy of peace, the purpose of which is to safeguard world peace and promote common development. . . . Since the policies of reform and opening-up were introduced, China, keeping in view the changes in the international situation, has upheld the important strategic judgment that peace and development are the theme of the present times, and declared on many occasions that China did not seek hegemony in the past, nor does it now, and will not do so in the future when it gets stronger." *Id.* See also China's Peaceful Development Road (2011), Part V.

²²⁵ China's Peaceful Development (2011), Part IV.

²²⁶ *Id.*

This indicates that China turns to Chinese civilization, hoping that it can help convince international society that China may be an exception to the “iron law” of the rise and fall of great powers. China stresses the “unity without uniformity (he e bu tong),” “harmony between man and nature (tian ren he yi),” “harmony is invaluable” (he e gui), and “you should not do unto others what you would not have them do unto you” (ji suo buy yu, wu shi yu ren), and so on. In a word, it is assumed that there was no “gene of invasion” in Chinese blood.²²⁷

5. Chinese International Legal Policies in the Context of Changing State Identity

As noted in Section 2, identity makes a difference to behavior, but a linear relationship between them may not readily be established. Therefore, discussing a specific legal policy in the context of China’s specific identity does not necessarily mean that China’s other identities do not play any role.

5.1 Changing Ideology and Chinese International Legal Policies

5.1.1 The Identity of the Orthodox Socialist State and Chinese International Legal Policies

The socialist countries led by the USSR developed their own international legal theory based upon Marxist ideology, which in many—albeit not all—aspects contradicted the international law originally developed by European states or bourgeoisie/capitalist international law, as it was called by socialist countries.²²⁸

There were two fundamental principles of socialist international law initially advocated and carried out by the USSR: the principle of peaceful coexistence between socialist states and capitalist states and the principle of socialist internationalism between socialist countries. The tenet of the peaceful coexistence was the equivalent of the idea of sovereign equality for capitalist states. In other words, capitalist states have an obligation under international law to respect the

²²⁷ Xi Jinping, speech delivered before China International Friendship Conference in Commemoration of the 60th Anniversary of the Chinese People’s Association for Friendship with Foreign Countries (May 15, 2014), available at http://www.xinhuanet.com/politics/2014-05/15/c_1110712488.htm (last visited March 20, 2018).

²²⁸ See generally G. I. Tunkin, *Theory of International Law*, trans. W. E. Butler (Cambridge: Harvard University Press, 1974); Kazimierz Grzybowski, *Soviet Public International Law* (Durham: Rule of Law Press, 1970); Ann van Wynen Thomas, *Communism versus International Law* (Dallas: South Methodist University Press, 1953); T. A. Taracouzio, *The Soviet Union and International Law* (New York: The Macmillan Company, 1935).

sovereignty of socialist states. By contrast, according to the socialist internationalism, the principle of peaceful coexistence or sovereign equality concepts was subject to the international socialist course.²²⁹

The socialist identity had significant implications on Chinese international legal policies.²³⁰ In the first two decades after the PRC was founded in 1949, China focused on the development of relations with other socialist countries. At domestic level, the Constitution (1954) affirmed that China “has built indestructible friendship with the great Union of Soviet Socialist Republics and the People’s Democracies.”²³¹ The Constitution (1975) provided that “in international affairs, we shall insist on Proletarian Internationalism. China will never be superpower. We shall enhance solidarity and support each other with socialist states, and all suppressed people and nations.”²³²

At international level, from 1949 to 1972 thirteen out of the twenty leading treaty partners of China were socialist countries, and all of China’s ten largest treaty partners were socialist states.²³³ In particular, China concluded two alliance treaties. In February 1950, China and the USSR concluded the Treaty of Friendship, Alliance and Mutual Assistance (“China-USSR Alliance Treaty (1950)”). In addition to providing that a contracting party would be obliged to provide military and other assistances to the other contracting party if it was under attack, it further stressed that the contracting parties would “participate in a spirit of sincere cooperation in all international actions aimed at ensuring peace and security throughout the world and to contribute their full share to the earliest implementation of these tasks.”²³⁴ The treaty also provided that the two contracting parties “shall consult with each other” as to “all important international issues affecting the common interests” of them.²³⁵ According to Mao Zedong, the treaty “establishes friendship between China and USSR in [a] legal manner, [and] make[s] China have a reliable allied state.”²³⁶ In July 1961, China also concluded a Mutual Aid and Cooperation Friendship Treaty with North Korea (“China-North Korea Alliance Treaty (1961)”), which includes the provisions similar to those mentioned above in the treaty with the USSR.²³⁷

²²⁹ G. I. Tunkin, at 3–4.

²³⁰ See generally Gengsheng Zhou, *International Law* (Beijing: The Commercial Press, 1976) (in Chinese) 5–8.

²³¹ Constitution (1954), Preamble.

²³² Constitution (1975), Preamble.

²³³ Gary L. Scott, *Chinese Treaties: The Post-Revolutionary Restoration of International Law and Order* (Leiden: Ocean Publications, Inc., 1975) 142, 156.

²³⁴ China-USSR Alliance Treaty (1950), art. 1.

²³⁵ China-USSR Alliance Treaty (1950), art. 4.

²³⁶ China’s Ministry of Foreign Affairs (MFA) and Literature Office of the Central Committee of CCP eds., *Selected Works of Mao Zedong on Diplomacy*, at 121.

²³⁷ China-North Korea Alliance Treaty (1961), arts. 2 and 4.

While the China-USSR Alliance Treaty (1950) discontinued in 1979, the China-North Korea Alliance Treaty (1961) remains effective. China, in accordance with the Treaty (1961), has provided great political and economic supports to North Korea for decades.

By contrast, China was wary that the engagement with capitalist countries would stain its socialist integrity, therefore it stressed "self-reliance" in the relations with the Western world.²³⁸ Thus, China was reluctant to engage those international legal regimes and institutions which it deemed not indispensable for the maintenance of its sovereignty and independence. For instance, after the adoption of Resolution 2758, both the GATT and the World Bank, directly or indirectly, expressed their intentions to resume China's membership. They, however, received no positive feedback from China.²³⁹ However, as Sino-Russian relations deteriorated, in the late 1960s China sought the resumption of China's seat in the UN, which, China assumed, could protect it. In October 1971 China succeeded in getting Resolution 2758 approved by the UN General Assembly, in accordance with which the PRC, on behalf of China, represented in the UN in lieu of the Republic of China (ROC), which had represented China in the UN since 1945.²⁴⁰

It should be noted that China's socialist approach to international law not only prevented extensive cooperation with Western countries but also sometimes constituted an obstacle to cooperation with many other developing countries. For instance, in the negotiation of the Charter of Economic Rights and Duties of States in the early 1970s, China opposed mentioning "interdependence" in international society, which was supported by many developing countries with the aim of enhancing North-South cooperation, because China believed it would increase the risk of developing states being exploited by developed states.²⁴¹ As noted previously, China was a firm supporter of "self-reliance." Also, China declined to join the Group of 77, a major mechanism against which developing states sought to establish the New International Economic Order (NIEO). As a result, it is assumed that China merely played a symbolic role in the NIEO movement.²⁴²

More profoundly, its socialist identity can explain China's legal policies that sometimes seemingly run against the principles of international law which were endorsed by China. During the 1960s and 1970s, for instance, China

²³⁸ Constitution (1975), Preamble; Constitution (1982), Preamble.

²³⁹ Harold K. Jacobson and Michel Oksenberg, *China's Participation in the IMF, the World Bank, and GATT* (Ann Arbor: The University of Michigan Press, 1990) 62–64.

²⁴⁰ United Nations General Assembly Resolution 2758, 1976th plenary meeting, October 25, 1971.

²⁴¹ Samuel S. Kim, *China, The United Nations, and World Order* (Princeton: Princeton University Press, 1979) 274, 330, 331, 332.

²⁴² *Id.*, at 330, 331, 332.

was allegedly involved in internal conflicts in some African and Asian countries by providing ideological, financial, and personnel support.²⁴³ For China, those activities were justified by the proletarian internationalism, together with the UN resolutions concerning decolonization.²⁴⁴ They, however, were considered interferences in the internal affairs of other states in breach of the UN Charter.²⁴⁵

As a matter of fact, the founding of the PRC in 1949 immediately raised anxieties among some countries, especially its neighbors,²⁴⁶ which were exacerbated by the trend that the USSR, the “big brother” among socialist states, sought the expansion of the socialist sphere of influence in order to compete with the U.S. around the world. During the Asia-Africa Bandung Conference (1955), then Premier Zhou Enlai frankly admitted that

as for the so-called aggressive and subversive activities by the communist party, delegates at present are kind not to refer to China, but the USSR only. China, however, also is a state ruled by a communist party, thus, we have to think what these delegates suggest also targets against China.²⁴⁷

Premier Zhou, however, did not give an explanation as to why China would not seek to expand the sphere of influence as the USSR did. Rather, he suggested that China would like to focus on “solidarity” rather than “quarrels,” and on “commonness” rather than “disagreements.”²⁴⁸ He submitted:

It there is any foundation for seeking commonness? Yes. This is the tragedy that most nations and people in Asia and Africa have suffered, are suffering from colonialism in the modern history. This is the fact that we all recognize. To find a common foundation with the aim to eliminate tragedies created by colonialism makes it very easy for us to understand, respect, sympathize and support each other, rather than to distrust, fear, exclude and conflict each other.²⁴⁹

²⁴³ See Warren Weinstein and Thomas H. Henriksen eds., *Soviet and Chinese Aid to African Nations* (New York: Praeger, 1980) 145–160; Axel Hameit-Sievers et al. eds., *Chinese and African Perspective on China in Africa* (Capetown: Pambazuka Press, 2010).

²⁴⁴ See, e.g., UN Assembly, Resolution 1514 of Declaration on the Granting of Independence to Colonial Countries and Peoples, December 14, 1960.

²⁴⁵ Timothy Webster, China’s Human Rights Footprint in Africa, 51 *Colum. J. Transnat’l L.* 626 (2012–2013) 640.

²⁴⁶ *Selected Works of Zhou Enlai on Diplomacy*, at 128.

²⁴⁷ *Id.*

²⁴⁸ *Id.*, at 121.

²⁴⁹ *Id.*

In other words, China stressed that it had a common identity with most Asian and African states, even though China was a socialist state.

As a matter of fact, the famous Five Principles of Peaceful Coexistence ("Five Principles") were arguably proposed largely out of consideration for alleviating the anxieties of other countries toward China arising from its socialist identity. The Five Principles include: (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual nonaggression; (3) mutual noninterference in each other's internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence. The Five Principles initially appeared in the preamble of the Agreement on the Trade and Intercourse between the Tibet Region of China and India, which was concluded between China and India in April 1954,²⁵⁰ and which was soon accepted by Burma in a Joint Statement with China on June 29, 1954. Although China, from the very beginning, asserted that the Five Principles would apply to all countries, the principle of coexistence, the core of the Five Principles, originally only applied to relations between states "with different social systems" as argued by the USSR.²⁵¹ In short, by proposing the Five Principles and, especially, their universal application to all countries, China aimed to assure other countries that it was a socialist country, but one unlike the USSR. The Five Principles for the first time were provided in the Constitution (1975)²⁵² and were reaffirmed in the Constitution (1982).²⁵³

Although still advocating proletarian internationalism, which was similar to the socialist internationalism originally invented by the USSR, China strongly opposed the application of socialist internationalism in China-USSR mutual relations. The two states fiercely quarreled over the principle of sovereign equality in the early 1950s shortly after the PRC was founded. In negotiating the China-USSR Alliance Treaty, the USSR, based upon the socialist internationalism, suggested that the treaty not mention the sovereign equality. On the contrary, China firmly insisted that this principle be included in the treaty. China eventually prevailed. The treaty explicitly provided that two contracting parties would develop mutual relations in accordance with the "principle of equality" mutual benefits, mutual respect of national sovereignty and territorial integrity, and nonintervention in internal affairs.²⁵⁴ It was its opposition to socialist internationalism that made China join neither the Warsaw Pact

²⁵⁰ The Preamble read that two countries would resolve their relations basing on "(a) mutual respect for each other's territorial affair and sovereignty; mutual non-aggression; mutual non-interference in each other's internal affairs; equality and mutual benefit; peaceful coexistence."

²⁵¹ Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, *Recueil des Cours*, vol. 221-II (1990) 266-267.

²⁵² Constitution (1975), Preamble.

²⁵³ Constitution (1982, as amended in 1988, 1993, 1999, 2004, 2018), Preamble.

²⁵⁴ China-USSR Alliance Treaty (1950), art. 5. *See also* China-North Korea Alliance Treaty, art. 5.

nor the Council for Mutual Economic Assistance (COMECON); rather, it only held observer status. Similarly, Mao Zedong firmly rejected the proposal from Nikita Sergeyevich Khrushchev, then state leader of the USSR, under which the two countries, under the China-USSR Alliance Treaty, would establish a military communication base in China. Thus, it was discerned that there was not “any prospect that the Socialist countries have a Socialist legal obligation to intervene against the Chinese leadership, although the fundamental interests of the peoples of China and the other Socialist countries are said to coincide.”²⁵⁵ Partly because of disagreement on socialist internationalism, China began to disassociate itself from the USSR. For instance, while the USSR was the largest treaty partners of China from 1949 to 1972, it dropped below the top ten during the period 1963–1972.²⁵⁶

Three major reasons can be presented to explain those deviations in Chinese international legal policies, even though China was an orthodox socialist country in the first thirty years of the founding of the PRC. First, since the mid-1950s, China had emerged as a major competitor for ideological leadership in the international socialist course. Therefore, it was unacceptable for China to simply accept socialist internationalism, thereby yielding itself to the USSR. Second, the pursuit of pulling China out of the state of century-old semi-colonialism was a major source of the legitimacy of Chinese Communist revolution.²⁵⁷ Obviously, if socialist internationalism was accepted, the legitimacy of the CCP would be seriously damaged. Third, socialist internationalism was in conflict with Chinese traditional worldview of “Under the Heaven” (Tian Xia). Although both socialist internationalism and the “Under the Heaven” were characterized by hierarchy, China under the “Under the Heaven” concept was culturally and psychologically superior to other states, and it would be inferior to the USSR in accordance with socialist internationalism. The history and civilization of China played some role in shaping Chinese international legal policies in the context of Chinese socialist identity.

5.1.2 The Identity of the “Revisionist” Socialist State and Chinese International Legal Policies

As China embarked on the Reforming and Opening-up Policy in the late 1970s, Deng Xiaoping suggested that China not waste time on “ideological debates” any longer.²⁵⁸ China thus prioritized the pursuit of “Four Modernizations,”

²⁵⁵ See W. E. Butler, “Socialist International Law” Or “Socialist Principles of International Relations”?, 65 *Am. J. Int’l L.* 796 (1971) 798.

²⁵⁶ Gary L. Scott, at 157.

²⁵⁷ See, e.g., Constitution (1954), Preamble.

²⁵⁸ *Selected Works of Deng Xiaoping* (Vol. 3), at 353.

which referred to highly developed agriculture, industry, science and technology, and defense.²⁵⁹ Since the 1980s, China has begun to engage international regimes and institutions in a constructive way. For instance, in 1980, China resumed its membership in the World Bank and the International Monetary Fund (IMF). The two international financial institutions had executive directors from China who were the first representatives from a Communist country.²⁶⁰ Also, in 1986, China applied to resume its status as an original contracting party in the GATT.²⁶¹ Because socialist identity, in accordance with orthodox socialist theories, is characterized and arguably sustained by the “command economy,” while international economic institutions like the GATT function with a presumption of “market economy,” whatever it means, China’s participation in these international institutions represented a remarkable departure from its traditional international legal policies.

One commentator suggested that the socialist identity would always remain an important variable in Chinese international legal policies.²⁶² However, China’s socialist identity was not considered by other countries, especially the U.S., to be a perceivable threat for about two decades after China embarked on the Reforming and Opening-up Policy in the late 1970s. Perhaps there were two major reasons. First, China did endeavor to cautiously liberalize its orthodox socialist ideology, especially in the economic field, by gradually implementing market-oriented policy. Thus, the Western countries had expectations that they could “dismantle existing state-led policies and practices” in China that “were incompatible with an international trading system expressly based on open, market-oriented policies.”²⁶³ Second, China was at the very early stage of national development. As a result, the “spillover effect” of the socialist regime with Chinese characteristics was not so huge as to constitute a threat to the Western world. Taking the human rights example, it is well known that the human rights issue has often provoked confrontations between China and the Western world since the mid-1980s. In order to defend its socialist legal policy on human rights, China never hesitated to mobilize political, economic, and diplomatic resources to refute the accusations of Western countries, especially at the Human Rights Commission of the UN.²⁶⁴ It should be stressed, however, that the Western world was not concerned with what the human rights situation in China would

²⁵⁹ China’s Constitution (1982), Preamble.

²⁶⁰ Harold K. Jacobson and Michel Oksenberg, at 80.

²⁶¹ Chung-chou Li, Resumption of China’s GATT Membership, 21 *J. World Trade* 25 (1986).

²⁶² See, e.g., James V. Feinerman, at 190.

²⁶³ United States Trade Representative, 2017 Report to Congress on China’s WTO Compliance (January 2018) 2.

²⁶⁴ See Ann Kent, *China, The United Nations, and Human Rights: The Limits of Compliance* (Philadelphia: University of Pennsylvania Press, 1999); Rosemary Foot, *Rights beyond Border: The Global Community and Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000);

bring to the outside world, but rather with how human rights were treated in China. In short, although Chinese socialist identity was a thorny issue, for some countries at least, they did not assume that it would constitute a threat.

As China rises, its socialist identity appears to have emerged as a more and more important variable in Chinese international legal policies, even though it is too early to assert that the history of ideological confrontations in international law between the USSR and the Western world in the early twentieth century will recur in the twenty-first century. For the part of some other countries, they find that, as China rises, the spillover effect of those undue advantages arising from Chinese socialism make them disadvantaged in their relations with China, and cannot afford inaction on Chinese socialist advantages any longer. They thus try to neutralize Chinese socialist advantages, which may arguably bring about ramifications on the ruling role of the CCP in China in the long run.²⁶⁵ Vice President Pence's recent attack against socialism, even though he does not explicitly mention China, perhaps signals potential battles on Chinese socialist identity at the international level.²⁶⁶

For the part of China, as China rises, it becomes more powerful and confident than before in defending its socialist identity by saying the international legal order should be more inclusive to accommodate socialist China,²⁶⁷ even though China reiterates that it has no intention of "exporting" its "model."²⁶⁸

The concern of some Western countries that China's socialist identity could potentially disrupt international order emerged during the marathon negotiations surrounding China's accession to the WTO, which, in terms of participation in the international order, represented another milestone event comparable to the appearance of the PRC in the UN in 1971. A major concern for many WTO Members was the omnipresence of the government and state-owned enterprises (SOEs) in the Chinese economy.²⁶⁹ China replied that it would endeavor to establish a "socialist" market economy.²⁷⁰ China further

Ming Wan, *Human Rights and Chinese Foreign Relations* (Philadelphia: University of Pennsylvania Press, 2001); Katrin Kinzelbach, *The EU's Human Rights Dialogue with China: Quiet Diplomacy and Its Limits* (London: Routledge, 2015).

²⁶⁵ See for example China's Trade-Disruptive Economic Model, Communication from the United States, WT/GC/W/745, 16 July 2018.

²⁶⁶ Remarks by Vice President Pence at the Federalist Society's Seventh Annual Executive Branch Review Conference, Washington, D.C., May 8, 2019.

²⁶⁷ President Xi Jinping appealed that "we should build an open and inclusive world . . ." Xi Jinping, *The Governance of China (Volume II)*, at 595.

²⁶⁸ See, e.g., "Xi Jinping: China will not 'export' Chinese model," available at <https://news.am/eng/news/424102.html> (last visited May 15, 2019).

²⁶⁹ *The Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, October 1, 2001, para.44.

²⁷⁰ *Id.*, para. 4.

promised that all Chinese SOEs would make purchases and sales based solely on commercial considerations.²⁷¹ Given the “transnational nature” of the Chinese economy, some WTO members required that “a pragmatic approach should be taken in determining China’s need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO Members.”²⁷² As a result, some special and differentiated (S&D) arrangements which favor developing countries do not apply to China, while China is subjected to some “WTO-plus” obligations which were not imposed on other WTO Members.²⁷³ For instance, the Protocol on the Accession of the People’s Republic of China (“China’s WTO Accession Protocol”) includes a provision regarding the “non-market economy.”²⁷⁴ In accordance with this provision, before China establishes that it is a market economy or that market economy conditions prevail in a particular industry or sector “under the domestic law of the importing WTO Members,” an importing WTO Member, in determining subsidies and dumping, has the right to apply a special methodology provided in the Paragraph 15(a) of China’s Accession Protocol, which disadvantages Chinese exporters.

The global economic crisis that broke out in 2008 further highlights Chinese socialist identity at the international level. Many countries, including the U.S., suffered a serious economic recession, while China sharply expanded its economic power. The exceptional performance of the Chinese economy enhances the confidence of many Chinese regarding so-called “socialist advantages.” For instance, SOEs are heavily relied on by China’s government to overcome economic crisis. In turn, the SOEs are privileged with substantial financial and other supports. The trend is described as “state capitalism.”²⁷⁵

Some countries have taken or considered more measures with the aim to neutralize Chinese socialist advantages. Some WTO Members support each other in claiming that the “socialist market economy” which is practiced in China is not a real market economy.²⁷⁶ In order to maintain discriminatory trade treatment toward imports from China, some states have asserted that they would continue to

²⁷¹ *Id.*, para. 46.

²⁷² *Id.*, para. 9.

²⁷³ Julia Ya Qin, “WTO-plus” Obligations and Their Implications for the World Trade Organization Legal System, 37 *J. World Trade* 483 (2003).

²⁷⁴ Protocol on the Accession of the People’s Republic of China, WT/L/432, 23 November 2001, para. 15(a) and (d).

²⁷⁵ See Curtis J. Milhaupt and Wentong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, 103 *Geo. L.J.* 665 (2014–2015); Li-Wen Lin and Curtis J. Milhaupt, We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China, 65 *Stan. L. Rev.* 697 (2013).

²⁷⁶ See, e.g., European Union—Measures Related to Price Comparison Methodology (DS516), Third Party Submission of the United States of America, November 21, 2017, paras. 26–31.

apply “non-market economy” status to imports from China, even though China’s WTO Accession Protocol included a “sunset date” of December 11, 2016 for that treatment.²⁷⁷ For instance, Regulation 2016/1036, which the EU approved in 2016, authorized the EU Commission, in calculating the normal value of a specific product, to maintain the “non-market economy” methodology toward China.²⁷⁸

In order to defend its socialist identity, China has begun to take its own measures. For instance, in December 2016, China required the EU, pursuant to Article 4 of the Dispute Settlement Understanding (DSU), to enter into consultation as to the relevant measures in Regulation 2016/1036. China argued that, in accordance with Paragraph 15(d) of China’s WTO Accession Protocol, the provision regarding its “non-market economy” would automatically cease to apply fifteen years after the date of accession, on December 11, 2016.²⁷⁹ Both the EU and China deem this case critical: the EU suggests it is “the most important live issue in WTO anti-dumping law,” and China argues that it is “especially important to China, not only legally, but also economically and politically.”²⁸⁰ As an exceptional arrangement, Zhang Xiangchen, China’s ambassador to the WTO, attended the first substantive meeting of the WTO panel and delivered a strong statement.²⁸¹ Zhang argued that “there was no need for China to meet any so-called ‘market economy’ criteria formulated by the European Union, the United States or any other WTO Member” after the fifteen-year transitional period expired in 2016.²⁸² In other words, China shall enjoy “the same rights as other WTO Members in anti-dumping proceedings,”²⁸³ regardless of its socialist identity.

China’s new policy on North Korea also illustrates how the changing socialist identity affects Chinese international legal policy. As North Korea has often taken provoking actions, especially nuclear tests, in the past decade, China tends to side with international society, including supporting the UN sanctions against North Korea.²⁸⁴ Some Chinese commentators debate as to whether the China–North Korea Alliance Treaty (1961) should be terminated. Some people suggest

²⁷⁷ China’s WTO Accession Protocol, para. 15(d). It reads: “In any event, the provision of subparagraph (a)(i) shall expire 15 years after the date of accession.”

²⁷⁸ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Official Journal of the European Union, L 176, 30.6.2016, art. 2(7).

²⁷⁹ European Union–Measures Related to Price Comparison Methodologies, WT/DS516/1, December 15, 2016.

²⁸⁰ Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the dispute: European Union—Measures Related to Price Comparison Methodologies (DS516) (6 December 2017), available at <http://wto.mofcom.gov.cn/article/xwfb/2017/12/20171202684580.shtml> (last visited January 2018).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See in detail Chapter Four, Section 3.1.2.

that, as the USSR disappeared, North Korea is no longer a leverage of China against the USSR. Furthermore, the treaty increases the risk of China of being involved in potential military conflicts between North Korea and countries like the U.S. Although some people support the treaty, that suggestion is evidently based on the consideration of regional security instead of socialist affinity between China and North Korea.²⁸⁵ It is believed that in today's China "no one ever brought up the treaty or a Chinese obligation to defend North Korea."²⁸⁶ This implies that a rising socialist China has no intention to struggle for any kind of "world socialist revolution" as it did in the early years of the PRC.

5.2 Changing Power and Chinese International Legal Policies

5.2.1 Identity of the Special Developing State and Chinese International Legal Policies

Based on its self-proclaimed status as a developing state, China always claims that those special international arrangements in favor of developing countries should apply to China as well. For instance, in negotiating its accession to the WTO, China strongly argued that it should have the right to enjoy "all the differential and more favorable treatment accorded to developing country Members pursuant to the WTO Agreement."²⁸⁷ Also, in the negotiations on international regimes for climate change, China advocates the principle of "Common but Differentiated Responsibility" (CDR), arguing China is entitled to the favorable arrangements that the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the UNFCCC provide for developing countries.²⁸⁸

As noted previously, however, China is not a "normal" developing country, but a special developing country with the potential to emerge as a great power. As a result, China on some occasions was either denied the privileges available to other developing countries or had special obligations imposed on it that were not imposed on other developing countries. In other words, while China itself claimed status as a developing country, this was not fully accepted by other

²⁸⁵ See Muke Wang, The Maintenance or Termination of Mutual Aid and Cooperation Friendship Treaty between China and North Korea, 14 (2011) *World Aff.* 64 (2011) 64 (in Chinese).

²⁸⁶ Oriana Skylar Mastro, Why China Won't Rescue North Korea: What to Expect If Things Fall Apart, 97 *Foreign Aff.* 58 (2018) 60.

²⁸⁷ Report of the Working Party on the Accession of China, WT/ACC/CHN/49, October 1, 2001, para. 8.

²⁸⁸ See Information Office of the State Council of China, White Paper on China's Policies and Actions for Addressing Climate Change (November 11, 2011), Part VIII, available at <http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1052718/1052718.htm>.

countries. As noted previously, for instance, China insisted that it be treated as a “developing country” in the negotiations of its accession to the WTO. Some WTO Members pointed out, however, that

. . . because of the *significant size, rapid growth* and transitional nature of the Chinese economy, *a pragmatic approach should be taken in determining China’s need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO Members. Each agreement and China’s situation should be carefully considered and specifically addressed* (all italics added). In this regard it was stressed that this pragmatic approach would be tailored to fit the specific cases of China’s accession in a few areas, which were reflected in the relevant provisions set forth in China’s Protocol and Working Party Report.²⁸⁹

That China was burdened with “WTO-plus” obligations implied that China was recognized as not a “normal” developing country, but a “special” developing country.

Also, because of China’s potential to emerge as a great power, many other developing countries expressed their hopes that China could act as “a leader of the Third World.”²⁹⁰ This illusionary “leadership” was firmly rejected by Deng Xiaoping. Deng proposed the famous foreign policy of “keep a low profile [Tao Guang Yang Hui]” for China. In December 1990, Deng warned that China could not “qualify as the leader in that we are not powerful enough to do that. We, however, absolutely should not do that, which is a fundamental national policy.”²⁹¹ As a result, China often either abstained or did not participate in the voting in the UN Security Council (UNSC), especially on contentious issues. China thus was considered a “silent power.”²⁹²

Nevertheless, China has many common interests with other developing countries. These countries thus endorse certain fundamental principles of international law, which mainly refer to the Five Principles. The Five Principles, originally developed among China, India, and Burma, were accepted by most other developing countries, including twenty-nine Asian and African countries, at Bandung Conference of which took place in April 1955.²⁹³ In

²⁸⁹ *The Report of the Working Party on the Accession of China*, para. 9.

²⁹⁰ *Selected Works of Deng Xiaoping* (Vol. 3), at 363.

²⁹¹ *Id.*, at 363.

²⁹² See Joel Wuthnow, *Chinese Diplomacy and the UN Security Council* (London: Routledge, 2013) 15–31, especially 18.

²⁹³ Final Communiqué of the Asian-African conference of Bandung (April 24, 1955).

celebrating the sixtieth anniversary of the Five Principles in 2014, President Xi Jinping reiterated that “the spirit of the Five Principles of Peaceful Coexistence, instead of being outdated, remains as relevant as ever; its significance, rather than diminishing, remains as important as ever; and its role, rather than being weakened, has continued to grow.”²⁹⁴ Furthermore, China to different degrees has long given support for other developing countries on a large range of issues. For instance, in the third UN Conference on the Law of Sea (UNCLOS III), China “firmly took side with the third world countries.”²⁹⁵ However, China’s legal policy on UNCLOS III now is found somewhat at odds with its rising sea power.²⁹⁶

5.2.2 Identity of the Special Rising Great Power and Chinese International Legal Policies

As its state power has dramatically expanded in the past decade, China began to adjust its international legal policies.

5.2.2.1 *From an Orthodox Conception of Sovereignty to a Flexible Conception of Sovereignty*

Negotiations on China’s WTO accession represents a historical process to clarify and enhance Chinese sovereignty, even though many Chinese people were filled with worries and anxieties that China’s sovereignty would be unduly harmed. As a matter of fact, Long Yongtu, then chief negotiator for China’s WTO accession and, Zhu Rongji, then China’s premier, were once blamed as “traitors” to China’s national interests.²⁹⁷ China’s WTO accession has brought about a huge “ripple effect.” Instead of only permitting disputes concerning the amount of compensation arising from expropriation to be submitted to international arbitration, most of the newly concluded Chinese investment treaties allow bringing “all” investor-state disputes—with exceptions similar to those used by many other states—to international arbitration.²⁹⁸ Furthermore, China has exhibited noticeable flexibility on issues such as human rights and international intervention toward which China traditionally held a tough position and forcefully argued for the full protection of sovereignty. For instance, China’s

²⁹⁴ Xi Jinping, Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World Through Win-Win Cooperation—At Meeting Marking the 60th Anniversary” (June 28, 2014), available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml.

²⁹⁵ Mincai Yu, China Being a Maritime Power under the UNCLOS: Issues and Way Ahead, 7 *JEAIL* 313 (2014) 315.

²⁹⁶ *Id.*, at 318–324.

²⁹⁷ John Pomfret, “China’s Surfers Make Waves,” available at https://www.washingtonpost.com/archive/politics/1999/06/23/chinas-surfers-make-waves/3ec86be4-c16b-4d8b-a280-1234b6d59f20/?utm_term=.38b477f80689 (last visited May 15, 2019).

²⁹⁸ See, e.g., China-Barbados BIT (1998), art. 9; China-Canada BIT (2012), art. 20.

policy toward humanitarian intervention has become more pragmatic.²⁹⁹ China has often given the approval of UNSC sanction resolutions.³⁰⁰

Noticeably, while reaffirming the value of the Five Principles, President Xi Jinping, in his speech delivered at the Conference on the sixtieth anniversary of the Five Principles in 2014, contended that the Five Principles are “open and inclusive.”³⁰¹ According to Liu Zhenmin, a deputy foreign minister of China, China not only “inherits” the Five Principles but also “develops” them over time. As an “open and inclusive” system of international legal principles, he said, the Five Principles have included new inputs: from “peaceful coexistence” to “peaceful development,” “harmonious world,” and “community of shared future.”³⁰² The move from the narrow “peaceful coexistence” to the broader “peaceful development,” “harmonious world,” and “community of shared future” requires more international cooperation which “has to be implemented by international treaties and in many cases permanent international organizations.”³⁰³ This shows that China tends to reconceptualize, cautiously but steadily, the sovereignty.

Still, it seems that China remains more sensitive to the issue of sovereignty than many other countries. The first and foremost reason obviously concerns China’s socialist identity. Currently, China is one of few socialist countries in the world. Thus it is understandable that China relies on the sovereignty argument to justify its socialist ideology and regime. China always maintains that “the choice of development path and social system made independently” by a country must be respected.³⁰⁴ Second, China repeatedly asserts that it continues its policy of siding with developing countries. According to President Xi Jinping, for instance, China’s vote in the UN “will always belong to the developing countries.”³⁰⁵ The third reason is that China is plagued by some domestic challenges, especially those concerning Tibet, Xinjiang, Taiwan, and Hong Kong.³⁰⁶ The sovereignty argument can serve to justify measures which China

²⁹⁹ See Jonathan E. Davis, *From Ideology to Pragmatism: China’s Position on Humanitarian Intervention in the Post-Cold War Era*, 44 *Vand. J. Transnat’l L.* 217 (2011).

³⁰⁰ See in detail Chapter Four, Section 3.1.2.

³⁰¹ Xi Jinping, “Carry Forward the Five Principles of Peaceful Coexistence to Build a Better World Through Win-Win Cooperation—At Meeting Marking the 60th Anniversary”

³⁰² Liu Zhenmin (vice foreign minister), “Adhere to Five Principle and Work Together to Build the Community of Destiny—Speech delivered at International Law Symposium in Memory of the 60th Anniversary of Five Principles of Peaceful Coexistence” (May 27, 2014), available at http://www.fmprc.gov.cn/web/wjb_673085/zjzg_673183/tyfls_674667/xwlb_674669/t1160330.shtml.

³⁰³ Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964) 61–62.

³⁰⁴ Xi Jinping, *The Governance of China* (Volume II), at 482.

³⁰⁵ *Id.*, at 572. See also China’s Peaceful Development Road (2011), Part III.

³⁰⁶ Phil C. W. Chan, *China, State Sovereignty and International Legal Order* (Leiden: Brill, 2015) 179–233.

takes to deal with these issues and to defend against potential accusations of other countries.

5.2.2.2 *From a Norm Taker to a Norm Entrepreneur*

Since the introduction of international law in China in the mid-eighteenth century, China remains a “taker” of international law, even though it is not fair to say that China had absolutely no voice in the international lawmaking.³⁰⁷ In the first thirty years after the PRC was founded in 1949, international law was largely rejected by the revolutionary China. However, to “take” international law was considered an important means of China to implement China’s Reforming and Opening-up Policy since the late 1970s and to engage international order in a constructive manner. As a result, whether, to what extent, and how China complies with international legal obligations have attracted nearly everyone’s attention in China and abroad.³⁰⁸ As a matter of fact, slogans such as “to follow international usages” and especially “to follow the WTO rules” were very fashionable in the 1980s and 1990s in China. In other words, China tries to convince international society that it is a “good” taker of international law or, more generally, a “good” citizen in international society.

However, China has started a new strategy shifting itself from a norm taker to a norm entrepreneur. I would like to suggest that there are two major reasons for this. First, the status of norm taker makes China significantly disadvantaged in international legal order. If China cannot participate in international rule-making in a meaningful way, it will inevitably be placed in a dilemma whether to accept international rules that are created by and favor other states or to reject them. Second, the expanding state power and, more generally, the new structure of international power enable China to play a larger role in international lawmaking. President Xi Jinping pointed out that “with the increase in global challenges and constant changes in the international balance of power, there is a growing demand for strengthening global governance and transforming the global governance system. We must seize the opportunity and take appropriate

³⁰⁷ As to the Chinese contribution to the Universal Declaration of Human Rights, see Chengwei Ju, *On the Contribution of Confucianism to the New Human Rights Theory: Starting from Peng Chun Chang’s Contribution to the Formation of the Universal Declaration of Human Rights*, 4 *China Legal Sci.* 50 (2016) (in Chinese).

³⁰⁸ See in particular Ann Kent, *China, The United Nations, and Human Rights: The Limits of Compliance* (Philadelphia University of Pennsylvania Press, 1999); Pitman B. Potter, *Assessing Treaty Performance in China: Trade and Human Rights* (Vancouver: UBC Press, 2014); Roda Mushkatt, *China’s Compliance with International Law: What Has Been Learned and the Gaps Remaining*, 20 *Pac. Rim L. & Pol’y J.* 41 (2011); Roda Mushkatt, *State Reputation and Compliance with International Law: Looking through a Chinese Lens*, 10 *Chinese JIL* 703 (2011); Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 *Mich. J. Int’l L.* 525 (2013–2014); Ann Kent, *Compliance v Cooperation: China and International Law*, 13 *Austl. Int’l L.J.* 19 (2006).

actions . . .”³⁰⁹ He urged that China should improve the ability to participate in global governance, especially including the ability to “make rules, set agendas, and carry out publicity and coordination.”³¹⁰

Such a strategy was included in the CCP Rule-by-Law Decision (2014) as a part of the whole strategy of socialist rule of law. The document requires that China “actively participate in international rule-making . . . increase China’s power of discourse and influence in international legal affairs” and “protect the legal rights and interests of Chinese nationals and corporations abroad in accordance with the law.”³¹¹ Another document co-issued by the CCP Central Committee and the State Council in 2015 also states that China should “actively participate global economic governance and become the participator and initiator” and “comprehensively participate in international economic system reform and rule making, propose new suggestions, new initiatives and new action schemes, and thus increasing China’s power of discourse in the international economic rules and standards making.”³¹²

Vice Premier Wang Yang reviewed the state of norm taker of China and illustrated Chinese ambitions for norm entrepreneurship. Wang said:

Competition of rules and standards is competition at the highest level. Since the accession to WTO, China has entered the core circle for negotiations for major economic issues and has been playing a more and more important role in global economic governance. Fundamentally speaking, however, China remains its role as taker and complier of existing international economic rules. . . . in a more active, confident and responsible manner, participate in reforming international system and making international rules, participate in the governance of global issues, increasing China’s power of discourse in the international economic rules and standards making . . .³¹³

Based on this new legal strategy, China has been active in offering “Chinese proposals” or “Chinese wisdom” on a large range of international agendas.³¹⁴

³⁰⁹ Xi Jinping, *The Governance of China (Volume II)*, at 487.

³¹⁰ *Id.*, at 490.

³¹¹ The CCP Rule-by-Law Decision (2014), Part VII.7.

³¹² Central Committee of the CCP and the State Council of China, *Some Opinion on the Construction of Open-Oriented New Economic Regime* (May 5, 2015) Part VII.

³¹³ Wang Yang, To Construct Open-Oriented New Economic Regime, *People’s Daily*, November 22, 2013.

³¹⁴ Xi Jinping, Jointly Shoulder Responsibility of Our Times, Promote Global Growth, Keynote Speech at the Opening Session of the World Economic Forum Annual Meeting 2017 (hereinafter “Davos Speech (2017)”), Davos, January 17, 2017. See also Wang Yi, “Exploring the Path of Major-Country Diplomacy with Chinese Characteristics,” available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1053908.shtml (last visited April 25, 2018).

To what extent China will achieve its goal of becoming a norm entrepreneur in the international lawmaking regime remains to be seen. The important thing is, however, that China has established it as prominent legal strategy.³¹⁵

5.2.2.3 *From Focusing on National Interest to More Attending to Community Interest*

In a fundamentally horizontal world, a state is generally justified placing as a priority the pursuit of its own interests. As a superpower, the U.S. never hesitated to pursue its own national interests. Currently, President Donald Trump publicly asserts what he pursues is the policy of “America First.”³¹⁶ According to the rational theory of international law by Goldsmith and Posner, what states pursue is how to “maximize” their national interests.³¹⁷

Interestingly, what China practiced for the two decades following the birth of the PRC was a strong community-oriented foreign policy, that is, the proletarian internationalism which was explicitly provided in China’s Constitution (1975). The major purpose of proletarian internationalism was to unify, solidify, and expand the community of socialist countries. As a result, during the period of 1971–1975, it was estimated that China’s foreign aid accounted for 5.88 percent of its national financial expenditure, most of which were given to other socialist countries.³¹⁸ Such a huge scale of foreign aid was obviously not sustainable for China, which at the time was still quite poor. This (socialist) community-oriented foreign policy was shifted to a state-oriented foreign policy after China started the Reforming and Opening-up Policy. In the era of Deng, China devoted itself to national development and adopted a policy of “keep a low profile” in international relations. Accordingly, the provision of proletarian internationalism was moved from China’s Constitution (1982).

As China rises, many countries urge China to be more sensitive to the interests of international community. A famous proposition to this effect was presented by then U.S. Deputy Secretary of State Robert B. Zoellick in 2005. Zoellick argued that “[w]e need to urge China to become a responsible stakeholder in that system” and “China has a responsibility to strengthen the international system that has enabled its success.”³¹⁹ Similarly, in its sixth document

³¹⁵ See in detail Chapter Four, Section 2.

³¹⁶ Jeremy Diamond and Stephen Collinson, “Donald Trump’s foreign policy: ‘America first,’” available at <http://edition.cnn.com/2016/04/27/politics/donald-trump-foreign-policy-speech/> (last visited January 20, 2018).

³¹⁷ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) 7.

³¹⁸ See Hongxi Yang and Kanming Chen, China’s Foreign Aids: Achievement, Lessons and Sustainable Development, 1 *Int’l Outlook* (2010) 49–51 (in Chinese).

³¹⁹ Robert B. Zoellick, Whither China: From Membership to Responsibility? Remarks to National Committee on U.S.-China Relations, 16 (4) *NBR* 5 (2005) 7.

on Chinese policy, the EU Commission argued that “China is already a major beneficiary of the international trading system and should assume a responsibility commensurate with those benefits, making a substantial contribution to reviving and completing the WTO Doha Round.”³²⁰

For the part of China, while persisting with its policy of enhancing national development, China has become more willing to shoulder more international responsibility. In the late 1990s, then President Jiang Zemin said that “with the increase of our international status, we have to bear more international responsibility and developing states also hope us to do so.”³²¹ In the China’s Peaceful Development Road (2011), China proclaimed that it is a “responsible developing great power” and thus it would “shoulder more international responsibility that its capability allows.”³²² China has significantly increased its contribution to peacekeeping actions,³²³ development aid,³²⁴ the UN budget,³²⁵ and so on. Furthermore, China has begun to undertake more commitments in some fields where it was reluctant to do so before. An important example is China’s support for the Paris Agreement on climate change. On September 3, 2016, China ratified the Paris Agreement, and thus China “has already wrestled

³²⁰ Commission of the European Community, *EU-China: Closer Partners, Growing Responsibilities*, Brussels, 24.10.2006, COM (2006) 631 final, at 8.

³²¹ *Selected Works of Jiang Zemin* (Vol. 2), at 202.

³²² China’s Peaceful Development Road (2011), Part III.

³²³ In his speech delivered at the 70th Session of the UN General Assembly at the UN in September 2015, President Xi Jinping declared that China decided to “establish a 10-year, US\$1billion China-UN peace and development fund to support the work of the United Nations, advance multilateral cooperation; join the new UN Peacekeeping Capability Readiness System; take a lead in setting up a permanent peacekeeping squad and building a peacekeeping standby force of 8000 troops; and provide a total of US\$100 million in free military aid to the Africa Union to support the establishment of the African Standby Force and the African Capability for Immediate Response to Crisis. Xi Jinping, *The Governance of China* (Volume II), at 574–575. See also Marc Lanteigne and Miwa Hirano ed., *China’s Evolving Approach to Peacekeeping* (London: Routledge, 2012); Jean-Pierre Cabestan, China’s Involvement in Africa’s Security: The Case of China’s Participation in the UN Mission to Stabilize Mali, 235 *China’s Q.* 713 (2017); Marissa A. Mastroianni, Growing Numbers of Chinese Blue Helmets: China’s Changing Role within the Security Council, 27 *Fla. J. Int’l L.* 121 (2015); International Crisis Group, China’s Growing Role in UN Peacekeeping, Asia Report No. 166—April 17, 2009.

³²⁴ In his speech given at the UN Sustainable Development Summit in 2015, President Xi Jinping announced that China would set up the South-South cooperation assistance fund, with initial contribution of US\$2 billion, to support other developing countries to implement their post-2015 development agenda; exempt the debt of the outstanding intergovernmental interest-free loans due by the end of 2015 owed by the relevant Least Developed Countries (LDCs), landlocked developing countries, and small island developing countries; and establish a knowledge center for international development to research and communicate with other countries on development theories and practices suitable to their respective national conditions. See Xi Jinping, *Towards Win-win Partnership for Sustainable Development*, Remarks at the United Nations Sustainable Development Summit, New York, September 26, 2015. See also Information Office of the State Council of China, *China’s Foreign Aid* (April 2011), available at <http://www.scio.gov.cn/zfbps/ndhf/2011/Document/896982/896982.htm>.

³²⁵ China contributed to over 12 percent of the UN regular budget in 2017, becoming the second largest contributor next to the U.S. only. See Assessment of Member States’ contributions to the United Nations regular budget for the year 2019, ST/ADM/SER.B/992, December 24, 2018.

the mantle of leadership on climate change from the United States.”³²⁶ More profoundly, China seeks to make normative contribution to the international society by sponsoring the Asian Infrastructure Investment Bank (AIIB)³²⁷ and the One Belt and One Road Initiative (BRI),³²⁸ and, more generally, by presenting a blueprint of “A Community of Shared Future,” which represents China’s new conception of world order.³²⁹ The building of “a community of shared future” has been enshrined in China’s constitution as amended in March 2018.³³⁰ In particular, since 2012 or so, “international public goods” were introduced within Chinese policy circles. Chinese leaders often promise that China is willing to provide “international public goods” for the international community.³³¹ In short, after three decades of nationalist tradition, China has begun to turn (or return) to internationalism or cosmopolitanism.

China’s turn (or return) to internationalism has multiple implications. For the part of China, first, internationalism provides a new source the legitimacy of China’s rise. China always claims that, under international law,³³² it has the inalienable right to development.³³³ China also claims that it focuses on “domestic development” and “does not shift problems and difficulties onto other countries.”³³⁴ However, in this highly interdependent world, the rise of China would not be possible but for extensive cooperation with, and support from, the outside world and, in turn, it may bring about growing spillover effects—positive or negative—on other countries. Therefore, the legitimacy of China’s rise rests on not only the right to development of China itself but also on the peace and prosperity of the whole international community. Second, internationalism may make the rise of China more efficient. The concept of internationalism is largely

³²⁶ Justin Worland, “It Didn’t Take Long for China to Fill America’s Shoes on Climate Change,” available at <http://time.com/4810846/china-energy-climate-change-paris-agreement/> (last visited March 20, 2018). Furthermore, Xi Jinping said that the Paris Agreement “is a hard-won achievement which is in keeping with the underlying trend of global development. All signatories should stick to it instead of walking away from it as this is a responsibility we must assume for future generations.” See Xi Jinping, Davos Speech.

³²⁷ See Chapter Five, Section 2.2.5.

³²⁸ See generally Zeng Lingliang, Conceptual Analysis of China’s Belt and Road Initiative: A Road towards a Regional Community of Common Destiny, 15 *Chinese JIL* 517 (2016); Julien Chaisse and Jędrzej Górski eds., *The Belt and Road Initiative: Law, Economics, and Politics* (Leiden: Brill/Nijhoff 2018).

³²⁹ See generally Ruan Zongze, Building a Community with a Shared Future: Meliorating the Era of Strategic Opportunity in China, 69 *China Int’l Stud.* 5 (2018);

³³⁰ China’s Constitution (as amended in 2018), Preamble.

³³¹ Xi Jinping, *The Governance of China (Volume II)*, at 598. See also Wang Yi, “Exploring the Path of Major-Country Diplomacy with Chinese Characteristics,” available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1053908.shtml (last visited March 20, 2018).

³³² See, e.g., Declaration on the Right to Development, UN General Assembly, A/RES/41/128, December 4, 1986.

³³³ See, e.g., The State Council Information Office of China, Development: China’s Philosophy, Practice and Contribution (December 2016).

³³⁴ See, e.g., China’s Peaceful Development Road (2011), Part I, para. 5.

based on multilateral regimes and institutions (for instance, the WTO), which are often effective in inducing member states to make, lock in, and enforce commitments. In other words, internationalism can serve as an instrument for China to pursue its own national interests. Third, attending more to international community concerns not only requires China to invest more resources but also, maybe more importantly, to be more involved in other countries' internal affairs in some manner, which has important implications for whether and to what extent China will change its long-standing policy of nonintervention. Although it should not be expected that China will publicly abandon such an established policy, the new "peaceful, justifiable and constructive" approach to international affairs, which was recently announced by Foreign Minister Wang Yi,³³⁵ suggests that some adjustment of traditional policy of nonintervention is necessary for China to better contribute to the interests of the international community. Of course, China will act in a manner different from countries like the U.S. in this regard. For instance, China may prefer interventions approved by the UN rather than those taken unilaterally by a single state.³³⁶

During a period when some traditionally great powers are relatively falling, and especially as the U.S. retreats from internationalism, China's turn to internationalism is good news for the international community. There appears an emerging consensus among many states that China will be vital to the maintenance of multilateral frameworks of trade and climate change, and so on.³³⁷

5.3 Changing Domestic Governance and Chinese International Legal Policies

The relationship between the domestic governance of a state and its international legal policies was once heatedly debated in the 1990s. Those arguing for the liberal theory of international law, like Slaughter, argued that democratic states would behave better than nondemocratic states in international society,³³⁸ while others disagreed. For instance, Alvarez found that the liberal states did not have a better record than those nonliberal states.³³⁹ In recent

³³⁵ "Foreign Minister Wang Yi Meets the Press" (March 9, 2018), available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1540928.shtml (last visited April 26, 2018).

³³⁶ See, e.g., MFA of China, Position Paper of the People's Republic of China on the United Nations Reforms (June 7, 2005), Part III (1), available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zjzg_663340/gjs_665170/gjxw_665172/t199318.shtml (last visited March 20, 2018).

³³⁷ See, e.g., "DG Azevêdo: China's commitment to openness will continue to drive the economy forward," available at https://www.wto.org/english/news_e/news17_e/dgra_12sep17_e.htm (last visited March 29, 2018).

³³⁸ Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *Eur. J. Int'l L.* 503 (1995).

³³⁹ José E. Alvarez, *Do Liberal States Behave Better: A Critique of Slaughter's Liberal Theory*, 183 *Eur. J. Int'l L.* 183 (2001).

years, a concern has been raised as to whether the rise of “undemocratic” China will make the world less stable and more confrontational. Suri, for instance, has argued that the rise of China “provide[d] an impetus for renewed conceptualization of the Kantian peace.”³⁴⁰ According to Immanuel Kant, three pillars of “republican constitutions, a commercial spirit of international trade and a federation of interdependent republics” would guarantee a “perpetual peace” among states.³⁴¹ Suri contended that, while the Kantian paradigm of the tripod has been embraced by many countries, it still is challenged by some states, especially China. According to Suri, China has accepted the two pillars of “international institutional linkages and commercial interdependence,” but it has not yet embraced “liberal democracy.”³⁴² In other words, the current state of Chinese domestic governance is the major hindrance for China to act as a “good citizen” in international relations.

Indeed, it is easy for the supporters and opponents of liberal international legal theory to find some evidence in support of their argument. I will not join the debates over whether or not liberal states do better than nonliberal states. However, one thing is arguably certain: those states with good governance, especially with a well-developed rule of law, are more likely to understand and deal with international affairs in a legal way, even though they do not necessarily do so in good faith. Furthermore, in contrast with traditional international law (about territorial delimitation, war, diplomatic privileges, state immunity, etc.), which regulates relations among states at the international level, more recently international law (trade, investment, human rights treaties, etc.) extensively involves regulatory power and thus must be implemented at a domestic level, and good governance obviously can help a state consent to and honor international obligations. In short, the domestic governance of a state can substantially affect the manner with which it understands and engages with international affairs and can also have an important bearing on whether it will behave well or not.

The state of “rule of man” as opposed to “rule of law” influences the manner in which China treats foreign affairs. For instance, how the government negotiates treaties is hardly released to the public. Chinese international lawyers have also criticized the way some treaties were concluded, as being in breach of legal procedure.³⁴³ Furthermore, the state of rule of man perhaps makes China reluctant

³⁴⁰ Manik V. Suri, *Conceptualizing China within the Kantian Peace*, 54 *Harv. Int’l L.J.* 219 (2013) 230.

³⁴¹ Immanuel Kant, *Towards Perpetual Peace and Other Political Writing on Politics, Peace and History* (Yale University Press, 2006) 74–85.

³⁴² Manik V. Suri, at 247, 251–253.

³⁴³ See, e.g., Naigeng Zhang, *The Amendment of Constitutional Procedure concerning the Treaty Ratification*, 1 *Pol. & L.* 17 (2004) 18 (in Chinese); Chen Yifeng, *The Treaty-Making Power in China: Constitutionalization, Progress and Problems*, 15 *Asian Y.B. Int’l L.* 43 (2009) 51.

to commit to some international obligations. For instance, the less-developed human rights protection is believed to be a major reason China has not yet ratified the International Covenant on Civil and Political Rights (ICCPR) twenty years after it signed the Covenant on October 5, 1998.³⁴⁴

However, there indeed is a trend in China for the conduct of foreign affairs to be included in the orbit of rule of law.³⁴⁵ It is expected that Chinese international legal policies will be deliberated, debated, and implemented with more internal checks and balances. The Regulation (Draft) for the Implementation of the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties ("Treaty-Concluding Procedure Regulation (Draft) (2017)"), which was released by the Legal Affairs Office (LAO) of the State Council of China on March 15, 2017, represents an important event that will significantly improve the manner in which China negotiates and concludes treaties.³⁴⁶ According to that draft, the legislature will be more involved in treaty-making by clarifying the authority to ratifying treaties.³⁴⁷ The effect of treaty-making on China's interests requires more detailed evaluation.³⁴⁸ Furthermore, it is also expected that China will be willing to undertake, and be capable of undertaking, more international commitments, for instance, the ratification of the ICCPR

It should be stressed that China's move to a rule-of-law state can help cause the relations between China and other countries to be handled in a legal manner, but it does not necessarily mean that potential disputes between them will be reduced. Instead, they might grow because, as the legal capability of Chinese legal officials develops, they will be more aggressive in asserting and defending China's national interests, for instance, by bringing international claims against other countries. Two commentators raised an interesting issue: "It would be paradoxical if the implemented socialist 'rule of law' reforms, as enforced by China in practice, lead to more clashes between China and the rest of world, at least in the short term."³⁴⁹ Curiously, this trend appears to have emerged. A Chinese trade official suggested that, as China increased human and financial resources in WTO affairs, China gradually moved toward a more active policy

³⁴⁴ In 2008 China admitted that it would continue "necessary legislative, judiciary and administrative reforms to create the conditions for the early ratification of the ICCPR." National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/4/CHN/1, November 10, 2008, para. 11.

³⁴⁵ Congyan Cai, Chinese Foreign Relations Law, 111 *AJIL Unbound* 336 (2017).

³⁴⁶ Legal Affairs Office of the State Council, Regulation of Implementation of the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties (draft for public comments), available at <http://www.mofcom.gov.cn/article/b/g/201705/20170502569554.shtml> (last visited March 20, 2018).

³⁴⁷ Draft, art. 17.

³⁴⁸ Draft, arts. 23, 25.

³⁴⁹ John Garrick and Yan Chang Bennett ed., *China's Socialist Rule of Law Reforms under Xi Jinping* (London: Routledge, 2016) 219.

regarding the settlement of WTO disputes.³⁵⁰ Another former Chinese senior trade official said that “dispute settlement has become our daily work.”³⁵¹

5.4. Reviving Civilization and Chinese International Legal Policies

It seems that Chinese civilization, on some occasions at least, has important implications for Chinese foreign policy. What has attracted the most attention from Western observers is the Chinese worldview of “Under the Heaven,” which was characterized by the hierarchy between the empire of China and the rest of the world. It is that the hierarchical worldview justified the famous tribute system.³⁵² Even during the period when Chinese civilization was assaulted in the twentieth century, this view still played some role in Chinese foreign policies. For instance, in 1963, then Premier Zhou Enlai mentioned some Chinese philosophical thoughts in Chinese foreign policies, for example, “retreat to avoid a conflict” (*tui bi san she*) and “you should not do unto others what you would not have them do unto you” (*ji suo bu yu, wu shi yu ren*). He contended that “it is these philosophic thoughts that we Chinese base on to handle affairs. These philosophic thoughts derive from our national tradition, not totally from Marxist-Leninist doctrines.”³⁵³

As noted previously, in addition to the concept of hierarchy, Chinese civilization is also characterized by pacificism, which presumably helps alleviate the anxiety of some other countries about the rise of China. Actually, it can be discerned that as China rises, it wants to seek more wisdom in Chinese traditional civilization. For instance, in 2005, China presented its new conception of the world order, namely, the “Harmonious World.” The concept of “Harmonious World” obviously derives from the spirit of “harmony” in Chinese civilization, which refers to “unity without uniformity,” “harmony between man and nature,” and “harmony is invaluable,” and so on.³⁵⁴ Another telling example is the BRI. According to China, the BRI was proposed to “inherit and carry forward the Silk Road spirit,”³⁵⁵ which may arouse “the historical memory” of participating countries.³⁵⁶ It was reported that, in order to “understand the history and

³⁵⁰ Wenhua, Ji and Cui Huang, China’s Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective, 45 *J. World Trade* 1 (2011) 25.

³⁵¹ Yang Guohua, China in the WTO Dispute Settlement: A Memoir, 49 *J. World Trade* 1 (2015) 10.

³⁵² John King Fairbank eds., *World Order: China’s Foreign Relations* (Cambridge: Harvard University Press, 1968) 2.

³⁵³ *Selected Works of Zhou Enlai on Diplomacy*, at 327–328.

³⁵⁴ China’s Peaceful Development Road (2005), Part I; China’s Peaceful Development Road (2011), Part IV.

³⁵⁵ Xi Jinping, *The Governance of China (Volume II)*, at 546.

³⁵⁶ *Id.*, at 547.

culture of the Silk Road and Maritime Silk and Road and learn from historical experience” and thereby to enhance the BRI, the Political Bureau of the CCP Central Committee held a “group learning” session in 2016.³⁵⁷

As noted previously, however, the implications that civilization has on international law should not be overstated. As far as China-related WTO disputes, for instance, a Chinese WTO official suggested that “China’s culture and tradition, in the authors’ view, only have, a limited bearing, if any, on China’s attitude towards WTO dispute settlement.”³⁵⁸

6. Concluding Remarks

In addition to a major difference in terms of changing international law previously examined in Chapter Two, another major difference between the rise of China in the twenty-first century and the rise of the U.S. in the twentieth century, the U.K. in the nineteenth century, and France in the eighteenth century is that China rises as a non-Western country within the international system overwhelmingly created by those Western countries. As a non-Western country, China has its own ideology, governance, and civilization, even though China, to a large degree, has been internationally socialized by its growing engagement with international regimes and institutions in the past forty years. Therefore, Western states might fail to engage a rising China in a constructive manner but for a correct perception of China’s state identity, which has an important bearing on its international legal policies and practice.

In the past several decades China’s state identity has been changing significantly from an orthodox socialist country to a “revisionist” socialist country, from a special developing country to a special rising great power, from a rule-of-man country to a rule-of-rule man, and from a falling civilized country to a renascent civilized country. In this process, China has strategically claimed its particular identity and accordingly has adjusted its international legal policies. It can be said that China’s strategy of state identity is successful, which enhances the rise of China.

However, some important disagreements between China and other countries remain, and, more importantly, new disagreements appear to have emerged. First, although international legal order has substantially succeeded in reshaping China’s state identity, it does accommodate many of China’s

³⁵⁷ *Id.*, at 546.

³⁵⁸ Wenhua Ji and Cui Huang, at 35.

particularities, especially socialist ideology. As China rises, some countries have recognized that China's particularities, which have brought about allegedly undue advantages in favor of China, should be more effectively addressed. However, a rising China has been more powerful in arguing that international legal order be more inclusive to accommodate China's particularities. In this process, socialist identity, which once disrupted international legal order in the first half of twentieth century, appears to emerge again as a major source of disagreements between China and some other countries. Second, although international law arguably has been more effective in containing great powers, which is debated in Chapter 2, and China always proclaims that it is an exception to the "iron law" of the rise and fall of great powers, namely, a new great power must seek international hegemony, it seems that the "iron law" of *Realpolitik* still prevails among many countries. Given there exists conventional thinking concerning a socialist country and great powers, China appears to turn to its traditional civilization, which is characterized by pacifism, inclusiveness, harmony, and so on, to claim its identity and to justify its international legal policies.

4

Regimes

1. Introduction

Since the late 1970s when China, by starting the Reforming and Open-up Policy, began more constructive engagement with international society, China has embraced a wide span of international regimes on matters ranging from peace and security to trade and investment, and to human rights and climate change, and so on. China has been a contracting party to hundreds of multi-lateral treaties and thousands of bilateral treaties.¹ Some observers suggest that China adeptly takes an approach of “selective adaptation,” thereby seeking to maximize the benefits and to minimize the risks arising from the relevant international regimes. The theory of “selective adaptation” is often used to explain why China has signed some treaties but rejected others, why China is more willing to honor some treaties than others, and why China complies with certain regimes better than others.² This chapter does not treat China’s engagement with international regimes in this same manner because other countries, like China, also take this approach to international regimes. Furthermore, the existing literature focuses on the records of China’s compliance with international obligations, which, I think, can be well explained with existing compliance theories, including the cost-benefit calculation theory by Neuhold, the legitimacy and fairness theory by Franck, and the managerial compliance theory by Chayes and Chayes.³ As a matter of fact, there has been a consensus among commentators that China’s record of compliance varies among different international regimes and that, although China cannot boast that it fully complies with international law, it is unfair to claim that China does not pay much regard to its international obligations. While the theory surrounding the reasons for

¹ In 2012, it was estimated that China has signed more than 20,000 treaties. See Official of MFA, People’s Republic of China has signed 22,000 treaties (January 13, 2012), available at <http://www.chinanews.com/gn/2012/01-13/3603728.shtml>.

² See, e.g., Pitman B. Potter, Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and practices, 2 *Wash. U. Global Stud. L. Rev.* 119 (2003); Pitman B. Potter, Selective Adaptation and Institutional Capacity: Perspectives on Human Rights in China, 61 *Int’l J.* 389 (2005–2006); Ljiljana Biukovic, Compliance with International Treaties: Selective Adaptation Analysis, 44 *Can. Y.B. Int’l L.* 451 (2006).

³ Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff Publishers, 2005) Chapters 4, 5, 6, and 7.

compliance is well developed, current literature has paid little attention to the methodology of China's compliance or how China complies with its international obligations. More importantly, current literature largely ignores the issue of China's norm entrepreneurship. As indicated in Chapter 3,⁴ as it rises as a great power, China has changed its international legal strategy. Namely, in addition to improving its compliance record, China is determined to seek more influence in international lawmaking, which not only enhances China's rise but also may bring about important implications for the international legal order and thus has apparently become a serious concern for some countries, especially the U.S. Thus, norm entrepreneurship should be treated as an issue as important, if not more important, as norm compliance.

In light of these, this chapter examines China's engagement with international regimes from the perspectives of both norm compliance and norm entrepreneurship. However, I will not debate too much the status quo of China's norm compliance or norm entrepreneurship. Instead, I focus on what methodologies China adopts to comply with its international obligations and achieves its norm entrepreneurship (Section 2). Then, in Section 3, I examine China's engagement with several international regimes in the three areas of peace and security, development, and human rights which, according to the UN, are "three pillars" of the "larger freedom."⁵ Moreover, given that a state is more likely to achieve its norm entrepreneurship in areas in which international law is still poorly developed and China has a high expectation of its potentially leading role in "new areas" of global governance,⁶ this chapter examines what China's legal policies toward cyberspace, which largely remains lawless and thus is open to states to compete for norm entrepreneurship, are and how China exerts its influences on international regulation of cyberspace.

2. From Norm Compliance to Norm Entrepreneurship

2.1. Norm Compliance

2.1.1 Methodology

The first methodology refers to "progressive compliance." Under this methodology, China claims that, although more efforts need to be made, it is

⁴ See Chapter Three, Section 5.2.2.2

⁵ UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, March 21, 2005, A/59/2005.

⁶ See, e.g., "Xi calls for reforms on global governance" (September 28, 2016), available at http://www.chinadaily.com.cn/china/2016-09/29/content_26931697.htm.

continually improving compliance with its international obligations. In other words, international obligations are being implemented by China in a progressive manner and therefore China should not be accused of defying international law but should rather be praised for its efforts. It is easy to find examples of how, in refuting accusations of noncompliance with international law, China always defends itself by illustrating a wide range of efforts it has made. For instance, in the latest national report submitted to the WTO Trade Policy Review (TPR) Body,⁷ China introduces numerous measures which, it argues, comply with its WTO obligations, including the establishment of an Inter-Ministerial Joint Committee on Trade Facilitation and integrated Customs clearance system to enforce the WTO Trade Facilitation Agreement, the establishment of intellectual property (IP) courts, and the initiation of an annual nationwide enforcement campaign against IP infringements to enforce the TRIPS Agreement, and so on.⁸ On the other hand, China always promises that it “will” continue its efforts. For instance, China, in that TPR national report, pledged that it “will remain committed to deepening comprehensively and accelerating efforts to improve the socialist market economy” and “reform of governmental administration system and the judicial system will be advanced, and systems for applying checks and oversight over the exercise of power will be further improved.”⁹ Similarly, China always stresses that it has never stopped improving its human rights records and undertakes to continue the effort.¹⁰ China often complains that its efforts have not been fully recognized. For instance, in commenting on the Section 301 investigation initiated by the U.S. in 2017, China criticized the U.S. for “turn[ing] a blind eye to the actual progress that China has achieved” in its market-oriented reforms, opening-up, and enhanced IP protection.¹¹

Some persons might suggest that in China the methodology of progressive compliance is misused or abused to distract from failure to fully satisfy its international obligations. This accusation is not totally unsound. Nevertheless, I think this methodology should be treated with sympathy. Firstly, on many occasions this methodology is permitted by international regimes themselves. As a matter of fact, many treaties do not provide clear-cut terms for contracting parties to implement treaty obligations. They also often leave substantial policy

⁷ Trade Policy Review: Report by China, WT/TRP/G/375, June 6, 2018.

⁸ *Id.*, at 5, 7, 9.

⁹ *Id.*, at 3, 4.

¹⁰ See, e.g., National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: China, A/HRC/WG.6/4/CHN/1, November 10, 2008.

¹¹ Statement by Ambassador ZHANG Xiangchen on Announcement of Proposed Tariff Actions under Section 301 by the US (April 4, 2018), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoints/201804/20180402728513.shtml>.

space to contracting parties to accommodate their national particularities. In accordance with the principle of good faith provided in Article 26 of the VCLT (1969), a state is justified in implementing its international obligations in a progressive manner. Secondly, progressive change methodology is rooted in the methodology that China applies to its national governance. By launching the Great Leap Forward in 1950s and the Cultural Great Revolution in 1960s, China attempted to apply “shock therapy” with the aim of building an orthodox socialist country as soon as possible. The Great Leap Forward and the Cultural Great Revolution placed the country at the edge of collapse.¹² Furthermore, Russian experience in the early 1990s alarmed China. At that time, Russia adopted the strategy of “shock therapy” with the goal of rapidly transforming itself from a socialist authoritarian country and command economy into a democracy and market economy. Unfortunately, Russia, like China in the 1960s, was soon immersed in nationwide disorder.¹³ In light of China’s own lesson and, later, the Russian experience, Chinese leaders now firmly believe that China should insist on a progressive approach to improve national governance. The former Chinese leader Deng Xiaoping proposed a famous theory of “touching stones when crossing the river,” which means every reform should be taken with caution.¹⁴ This is why President Xi Jinping contends that China never stop the course of reform.¹⁵ Such an approach to national governance is highly relevant to how China complies with its international obligations.

The second methodology refers to “paper compliance.” The term “paper compliance” was coined by Webster to describe China’s compliance with WTO rulings.¹⁶ According to Timothy Webster, although China has timely complied with the WTO rulings “in a qualitatively sound manner” in most cases and thereby exhibited a “high degree” of compliance compared with many other trading powers, such as the U.S.,¹⁷ it maintains intact some trade measures inconsistent with WTO rulings or does not revise them in accordance with WTO rulings.¹⁸ I like the term, but I would like to add my own understanding. In my opinion, “paper compliance” means compliance in words rather than compliance in action. There has long existed a big gap between the law in books and

¹² See Chapter Three.

¹³ Peter Murrel, What Is Shock Therapy? What Did It Do in Poland and Russia?, 9 *Post-Soviet Aff.* 111 (1993).

¹⁴ John W. Head, Felling the Stones When Crossing the River: The Rule of Law in China, 7 *Santa Clara J. Int’l L.* 25 (2009–2010) 54.

¹⁵ “Xi Jinping: Reform will carry on forever and does not end” (August 15, 2018), available at http://news.ifeng.com/a/20180815/59824406_0.shtml.

¹⁶ Timothy Webster, Paper Compliance: How China Implements WTO Decisions, 35 *Mich. J. Int’l L.* 525 (2014).

¹⁷ *Id.*, at 574, 535.

¹⁸ *Id.*, at 533.

law in action in China. Many Chinese laws are poorly respected and enforced in practice.

It is not difficult to find examples of the fact that, in defending its records of compliance, China tends to stress what laws have been into force, but it often does not go further and provide details on how those laws are enforced in practice.¹⁹ Although compliance in words in and of itself is necessary, the failure to demonstrate compliance in action increases the difficulty for other countries and international organizations to assess the extent that China has complied with international obligations,²⁰ thereby reducing the credibility of China's self-proclaimed compliance. In his comment on the white paper on China and the WTO that was issued in June 2018,²¹ Shea, the U.S. ambassador to the WTO, criticized the fact that China, according to that white paper, provided few details about the "actual" policies and practices that China pursues.²²

2.1.2 Prospect

In my opinion, it is of little value to debate the extent to which China has complied with international law in a general manner. Nor is it productive to predict exactly to what extent China will improve its records of compliance. However, it is worth mentioning three major factors that are highly relevant to China's future compliance with international law.

Firstly, the continual improvement of national governance will enhance China's compliance with international law. As Chayes and Chayes rightly suggested, the failure of a state to comply with international law on many occasions is not caused by its willful defiance of international obligations but because of limitations on its compliance capability.²³ As China continually improves its national governance, it is expected that China will steadily increase its capability of complying with international law. Take family planning as an example. For decades, China has been accused of persistent violations of Articles 10 and 12 of the ICESCR because of coercive measures, such as forced abortions and sterilization, which were taken to implement the "one child"

¹⁹ See, e.g., National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: China, A/HRC/WG.6/4/CHN/1, November 10, 2008.

²⁰ Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macau), E/C.12/1/Add.107, May 13, 2005, at 2.

²¹ The State Council Information Office of China, *China and the World Trade Organization*, June 28, 2018 (hereinafter "China and the WTO (2018)").

²² Statement Delivered by Ambassador Dennis Shea, WTO General Council, Geneva (July 26, 2018), available at <https://geneva.usmission.gov/2018/07/27/55299/>.

²³ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement* (Cambridge: Harvard University Press, 1995) 24–32.

policy that China pursued with aim to control its population.²⁴ In 2013, China adopted a new policy allowing couples to have a second child when one of the parents is an only child. In its periodic review of China compliance in 2014, the Committee on Economic, Social and Cultural Rights (CESCR), a human rights body responsible for monitoring the implementation of the ICESCR, welcomed that positive development.²⁵ Still, the CESCR Committee remained concerned that “there continue to be restriction[s] on the opportunity for persons to freely to decide on the number of children they have.”²⁶ It is believed that the policy of family planning is likely to be repealed soon.²⁷ Thus, it is believed that China will improve its compliance with Articles 10 and 12 of the ICESCR. This demonstrates that progression in national governance can lead to progressive compliance with international law.

Secondly, China’s ambition to become a great power may increase the wish and capability of China to comply with international law. Timothy Webster assumes that the more China expands its power, the more likely it becomes that China will turn a deaf ear to its international obligations.²⁸ This prediction is largely unsound. The more likely outcome, however, may be that China will be more willing to improve its image of law compliance. As suggested in Chapter Two, as rule of law has been embraced as a universal value at both an international and national level, international law can endow the rise of China with legitimacy. Therefore, the better the records of compliance are, the more legitimate the rise of China will be. According to Andrew T. Guzman’s rational choice theory, state reputation is a major consideration for a state when choosing whether or not to behave in accordance with international law.²⁹ Roda Mushkat illustrated how state reputation can enhance the compliance of China with international law.³⁰ Equally importantly, as China rises, it has more resources available to “internalize” the risks and costs arising from international law compliance.

²⁴ Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (including Hong Kong and Macau), E/C.12/1/Add.107, May 13, 2005, at 6

²⁵ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Second Periodic Report of China, including Hong Kong, and Macao, China, Ec.12/CHN/CO/2, June 13, 2004, at 8.

²⁶ *Id.*

²⁷ Echo Huang, “China just got one step closer to ending its family-planning policies” (March 14, 2018), available at <https://qz.com/1228653/china-just-got-one-step-closer-to-ending-its-family-planning-policies/>.

²⁸ See Timothy Webster, at 574.

²⁹ See generally Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008) Chapter 3.

³⁰ Roda Mushkat, State Reputation and Compliance with International Law: Looking through a Chinese Lens, 11 *Chinese J. Int’l L.* 703 (2011).

Thirdly, the improved enforcement mechanisms of international law may induce China to comply with its international obligations. As previously discussed,³¹ over the past two decades, international adjudicatory bodies have proliferated. By making binding decisions, international judges not only order states to behave in accordance with international law but also provide guidance how states comply with their international obligations. In addition, more and more international surveillance mechanism, for instance, the universal periodical review (UPR) for human rights treaties and the TPR for WTO regimes, have been developed to monitor compliance with international law. Although most international surveillance mechanisms are not vested with the authority to make binding decisions like international courts, they serve as helpful forums where states periodically report their compliance and receive comments and recommendations from other states and international institutions. Take as an example the UPR on China's compliance with human rights treaties. According to the national report that China submitted for the second UPR in 2013, about thirty governmental bodies and about twenty NGOs were involved in the preparation of that report, and that report was open to the public for comments.³² That report also introduced that a Working Group was established under the auspice of the Ministry of Foreign Affairs (MFA). The Working Group convened numerous meetings to study how to carry out recommendations suggested in the first UPR on China in 2009.³³

2.2 Norm Entrepreneurship

2.2.1 Methodology

Four methodologies are employed by China to achieve its norm entrepreneurship.

The first methodology refers to the advocacy of broadly principled arguments. Under this methodology, China proposes basic principles, initiatives, or positions rather than rules. The most important one may be the Community of Shared Future for Mankind proposed by President Xi Jinping. It represents China's new vision of world order. China spares no effort to advocate for these principled arguments to international society at the international level and the national level. For instance, China succeeded in incorporating the conception of the Community of Shared Future for Mankind in several UN documents. Also, China often introduces in depth its principled arguments in

³¹ See Chapter Two, Section 2.3.

³² National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/17/CHN/1, August 5, 2013, at 2.

³³ *Id.*

white papers or position papers. For instance, China announced its principled policy toward UN reform in the Position Paper on the UN Reform, which was issued in June 2005 ("Position Paper (2005)").

The methodology of principled advocating is attributed to a number of factors. The first concerns Chinese thinking. From the philosophical perspective, Chinese people are strong at holistic thinking rather than analytical thinking. They prefer to understand the world in a comprehensive way but have less interest in analyzing the individual parts of the world. Such a pattern of thinking substantially influences Chinese legal practice. For instance, "broadness is better than concreteness" (*yi cu bu yi xi*) has long been maintained as a guidance for Chinese legislation. As a result, many Chinese laws are enacted too broadly to be enforced in practice. Chinese domestic thinking and legal culture presumably have some implications for Chinese international legal practice. Namely, Chinese legal officials prefer to propose legal principles and positions rather than legal texts and rules at the international level. The second and arguably more important factor concerns the capability of Chinese legal officials. Since Communist China once totally rejected the rule of law in national governance and was hostile to international legal order led by the Western world, legal institutions were dismantled, legal personnel lost jobs, and legal education was discontinued. As a result, there were few highly qualified officials and scholarship in international law when China re-engaged the international legal order in the late 1970s.³⁴ For instance, Wang Jiangyu documented his experience as a member of the Chinese delegation attending negotiations on a treaty under the auspices of the UN Commission on International Trade and Law (UNCITRAL) in 1999. Wang recalled:

I have a general conception of the topic we discuss, but do not know any concrete issue. . . . international negotiations are so demanding and a concrete issue is so important. I cannot say anything because I do not have sufficient knowledge of the subject matter . . . who am I? what should I do? am I a member of Chinese delegate attending the treaty negotiations? should I not know these issues? . . .³⁵

³⁴ See generally Sompong Sucharitkul, *Rebirth of Chinese Legal Scholarship, With Regard to International Law*, 3 *LJIL* 4 (1990); Sompong Sucharitkul and Rong Wei Cai, *Rebirth of Chinese Legal Scholarship, a Personal Recollection*, 2 *Int'l Legal Persp.* 1 (1990); Qingjiang Kong, *International Law Teaching in China: Engaging in a Pedagogical Reform or Embracing Professionalism and Internationalization?*, 12 *Cambridge J. China Stud.* 1 (2017).

³⁵ Citing from Song Jie, *The Effectiveness of Chinese Participation in International Legal Affairs through the Prism of the U.K. and the U.S.*, 2 *Comp. L. Stud.* 148 (2015) 149 (in Chinese).

Through a survey on Chinese participation in the ILC of the UN and the ICJ, Song Jie found that China merely announced principled arguments and gave some general comments. This prevented China from effectively participating in international legal affairs. A major constraint, according to Song Jie, is the deficiency of legal capability of Chinese negotiators.³⁶

Indeed, the principled arguments are not legal rules. It is still significant, however. In the history of international law, the principled arguments determined the spirit and value of international law, further influencing the creation, interpretation, and application of legal rules. Many international legal rules formed in the early years of international law, for instance, those concerning *res nullius*, diplomatic protection, capitulation, and minimum standard of treatment for aliens, were based on the Western conception of civilization. Today, it seems that the Western world is more concerned with whether the spirit and value of international law crafted by the Western countries will be substantially reshaped than with whether some specific international legal rules will be revised as China rises as a new great power.

The second methodology refers to the reliance on legal interpretation. It should be recognized that the spirit, value, regimes, and institutions that were advocated and crafted by the Western world have become deeply embedded in contemporary international relations. Thus, G. John Ikenberry believed that “[t]oday’s Western order, in short, is hard to overturn and easy to join.”³⁷ This implies that it will not be easy for China to achieve its norm entrepreneurship through lawmaking. As a matter of fact, the rise and demise of the socialist international law advocated by the Soviet Union in the first half of the twentieth century has shown that it is difficult, if not impossible, to denounce “Western” international law, which actually does not totally disadvantage non-Western countries. Furthermore, numerous ambiguities and flexibilities remain in international law.³⁸ This means many international legal rules are open to interpretation. As a result, legal interpretation may serve to enhance China’s norm entrepreneurship.

China’s approach to human rights is a good example. Before the 1990s, China was critical of human rights rules, denouncing them as an instrument of capitalist countries to justify their intervention in the internal affairs of less powerful countries including China. Since the 1990s, however, China has embraced the conception of human rights and has approved many human rights conventions.

³⁶ *Id.*, at 158–159.

³⁷ G. John Ikenberry, at 24.

³⁸ This is why international law is considered to represent an “incomplete contract.” See generally Robert E. Scott and Paul B. Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge: Cambridge University Press, 2006).

In doing so, however, China seeks to reinterpret the meaning of human rights by arguing that rights and obligations should be balanced in human rights and that civil and political rights should be given equal importance to economic, social, and cultural rights.³⁹

The third methodology refers to the building of coalitions of the willing.⁴⁰ Since international power continues to disperse in the twentieth century any great power, including the U.S., which was considered the sole superpower in the wake of the Cold War, no longer owns overwhelming power like the U.K. did in the nineteenth century. Therefore, a great power usually seeks coalitions of the willing to help it conduct a major international action. Furthermore, the coalition of the willing can presumably increase the legitimacy of an international action of a state. An important example is how the U.S., by establishing coalitions of the willing which included the U.K., and so on, waged the Iraq War of 2003.⁴¹

China always announces that it pursues an independent foreign policy and never seeks an alliance with any other countries. For instance, although China always proclaims itself a developing country and pledges to side with developing countries, it has joined neither the G-77 nor the Non-Aligned Movement. Such a diplomatic strategy is not helpful for attempts to coordinate and cooperate effectively with other countries to achieve its norm entrepreneurship. Given that China is one of the few socialist countries, a coalition of the willing would be of special significance to the legitimacy of international action by China. Noticeably, China has begun to be more inclined to advocate for its legal initiatives by seeking coalitions of the willing. For instance, China initiated the Friends of Investment Facilitation for Development (FIFD) group within the WTO and sponsored the Joint Ministerial Statement on Investment Facilitation for Development, which was signed by over seventy members in 2017.⁴² Similarly, China seeks to cooperate with other Shanghai Cooperation Organization (SCO) Members and countries in Africa, the Middle East, and Latin America to develop international regulations for cyberspace.⁴³ Anthea Roberts observed that China and Russia have increased cooperation and coordination on international law.⁴⁴ For instance, two states jointly

³⁹ See Chapters Four and Five.

⁴⁰ As to coalitions of the willing, see generally Alejandro Rodiles, *Coalitions of the Willing and International Law* (Cambridge: Cambridge University Press, 2018).

⁴¹ "US claims 45 nations in 'coalition of willing,'" available at <https://www.theguardian.com/world/2003/mar/19/iraq.usa>.

⁴² China and the WTO (2018), at Part II.1.

⁴³ See Chapter Six, Section 3.6.

⁴⁴ Anthea Roberts, *Is International Law International?* (New York: Oxford University Press, 2018) 285–298.

issued a declaration on the promotion and principles of international law in 2016.⁴⁵

The fourth methodology refers to the seeking of “state practice” at the domestic level. International law is to some degree a result of the internationalization of national law of great powers especially.⁴⁶ According to Article 38 (1) of the ICJ Statute, “state practice” refers to the relevant practice both at a national level and at an international level. Thus, a state, through domestic practice, advocates its legal arguments and exerts its influence in the formation and interpretation of international law. For instance, judicial practice on a “taking” provided for in the Fifth Amendment to the U.S. Constitution has played a prominent role in the clarification of the meaning of “indirect expropriation” in investment treaties and investment arbitration.⁴⁷ Compared with state practice at an international level, which must be constrained by other countries, a state has more discretion to develop its own national practice.

Clearly, in recent years, China has substantially strengthened national legal practices that are supposedly aimed at advocating for its international legal policies. It seems that China’s legislature has significantly increased the efforts with an aim to consolidate China’s international legal policies. For instance, in September 2016, China adopted the Law on the Exploration and Exploitation of Deep Seabed Resources, which is designed to “regulate exploration and development activities of resources in deep seafloor areas, promote deep sea scientific research and technology, resource investigation, marine environmental protection, so as to ensure the sustainable use of deep seabed resources and maintain the common interests of mankind.”⁴⁸ The “deep seafloor area,” in accordance with that law, refers to “seabed and ocean floor and subsoil.”⁴⁹ Obviously, that law not only reaffirms the rights of China under the Part XI (The Area) of the UNCLOS but also is helpful for China to exert more influence on the future negotiations of the regime on “The Area.” In particular, more

⁴⁵ Text of Russia-China Joint Declaration on Promotion and Principles of International Law (June 25, 2016), available at <https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law>.

⁴⁶ See generally Cyril M. Picciotto, *The Relation of International Law to the Law of England and to the United States of America* (New York: McBride, Nast & Company, 1915).

⁴⁷ See generally Rachel D. Edsall, Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations, 86 *B.U. L. Rev.* 931 (2006); Michael Muse-Fisher, CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards a United States Takings Framework for Analyzing International Expropriation Claims, 19 *Pac. McGeorge Global Bus. & Dev. L.J.* 495 (2007); Vicki Been and Joel C. Beauvais, The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for An International “Regulatory Taking” Doctrine, 78 *N.Y.U. L. Rev.* 30 (2003).

⁴⁸ Law on the Exploration and Exploitation of Deep Seabed Resources (adopted at 19th Meeting of the Standing Committee of the Twelfth National People’s Congress February 26, 2016), art. 1.

⁴⁹ *Id.*, art. 2.

and more Chinese laws include provisions of extraterritorial applicability.⁵⁰ Furthermore, Chinese courts can presumably play a part in Chinese norm entrepreneurship. As examined later,⁵¹ Chinese courts have begun to be more relied upon to enhance China's norm entrepreneurship. As He Rong, who was then vice president of the Supreme People's Court (SPC), suggested, by deciding certain cases, Chinese courts might not only exert influence on the interpretation and application of treaties but also might promote the formation and development of customary international law and basic principles of international law, and even fill the legal vacuum in international law.⁵²

2.2.2 Prospect

Three major factors are of high relevance to China's future norm entrepreneurship.

The first one is simply power. As the history of international law suggests, although legal initiatives were often proposed by less powerful countries, nearly all of them came to be realized by great powers.⁵³ This implies that the norm entrepreneurship of a state in the international arena should be sustained by the power that that state owns. As power continues to disperse among states, great powers may no longer be as comfortable as they were before in advocating their legal initiative. Indeed, China is rising as a new great power, but it remains to be seen whether China will be powerful enough to sustain not only the power to advocate for legal initiatives, but more importantly, the achievement of those legal initiatives.

The second factor is capability building. As suggested previously, capability building is highly relevant to China's norm entrepreneurship. In recent years, China's government has made more efforts to improve the legal capability of governmental officials,⁵⁴ enhanced public-private partnership (PPP) including frequently inviting international lawyers to participate in treaty negotiations, financing international lawyers to conduct background researches, and encouraging international lawyers to defend Chinese international legal policies and practices,⁵⁵ and has encouraged Chinese law firms to develop international legal service,⁵⁶ and so on. All these efforts can significantly enhance China's

⁵⁰ See, e.g., China's Cybersecurity Law (2016), art. 5.

⁵¹ See Chapter Six.

⁵² He Rong, On Participation of Chinese Judiciary in the Formation of International Economic Rules, 1 *Int'l L. Stud.* 3 (2016) 9 (in Chinese).

⁵³ L. Oppenheim, *International Law: A Treatise (Vol. 1)* (New York: Longmans, Green and Co., 2nd ed., 1912) 170.

⁵⁴ Yang Guohua, at 3–5; Gregory Shaffer and Henry Gao, China's Rise: How It Took on the U.S., *U. Ill. L. R.* 115 (2018) 137–140.

⁵⁵ Congyan Cai, The Role of Chinese International Law Scholars in International Legal Practice, 2 *China L. Rev.* 79 (2016) (in Chinese); Anthea Roberts, at 122–123, 226–229, 240–241.

⁵⁶ Gregory Shaffer and Henry Gao, at 154–158.

capability building in international law. As a result, in addition to continuing the advocacy of principled arguments, China is expected to propose more legal rules and, more importantly, to solicit support for those rules from other countries.

The third factor is “rules competition.” As indicated in the introduction, then U.S. President Obama proclaimed that the U.S. should prevent China from making trade rules for the world. Whatever the desire of other nations, as a matter of fact, “rules competition” among states has become a conspicuous phenomenon over the past decade. Take as an example the ongoing reform of the investment treaty regime, which arguably has encountered a “legitimacy crisis.”⁵⁷ Many countries have proposed a range of initiatives to make investment treaties more balanced, coherent, and predictable.⁵⁸ The U.S. and the EU, two leading players in international regulation on investment for decades, have announced their proposals,⁵⁹ hoping to maintain their leadership in the legal order regulating international investment. At the same time, countries like Brazil, which traditionally played minor roles in international investment law, have also proposed their initiatives.⁶⁰ In other words, other countries, especially other great powers, will compete with China for norm entrepreneurship.

3. China and International Regimes

3.1. China and Peace and Security Regimes

3.1.1 China and Responsibility to Protect

Humanitarian intervention, which concerns complicated political calculation and concerns for cultural, regional, and ethnic backgrounds, is an issue which endlessly ignites controversy and confrontation among states. There are numerous issues to dispute with respect to humanitarian interventions, such as their legality, legitimacy, and consequences.⁶¹ Two things, however, appear

⁵⁷ See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *Fordham L. Rev.* 1521 (2005).

⁵⁸ UNCTAD, *Reform of the IIA Regime: Four Paths of Action and A Way Forward*, IIA Issue, No. 3, June 2014.

⁵⁹ See European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, September 26, 2014; European Commission, *Proposal for Permanent Investment Courts*, December 2015; 2012 US Model BIT.

⁶⁰ See Felipe Hees and Henrique Choer Moraes, *Brazil's Pioneering Approach to Investment Agreements*, *AJIL Unbound* (2018).

⁶¹ See generally Terry Nardin and Melissa S. Williams eds., *Humanitarian Intervention* (New York: New York University Press, 2006); J. L. Holzgree and Robert O. Keohane eds., *Humanitarian Intervention: Ethnic, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); Report of the Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, A/54/2000, March 27, 2000, para. 216.

almost indisputable. Firstly, nearly all humanitarian intervention operations are waged by great powers against less powerful countries.⁶² Secondly, humanitarian intervention ostensibly is not consistent with the principle of nonintervention and, in the case of military intervention, the principle of the prohibition of the threat or use of force, both of which were solemnly established in Article 2 of the UN Charter. Therefore, most less powerful countries are highly critical of humanitarian intervention. Given its long-standing diplomatic policy of respect for state sovereignty and its own experience of a century-long humiliation since the mid-nineteenth century, China, like many other developing countries, nearly always opposes humanitarian intervention.⁶³ Likewise, Chinese commentators are always critical of humanitarian intervention. For instance, a commentator, in analyzing the American military actions against Dominica in April 1965, suggested that the excuses given by the U.S., for instance, “to protect American lives,” “to save the lives of all (Dominican) people,” and “to maintain law and order,” were ridiculous.⁶⁴

Genocides and other gross and systematic violations of human rights committed in Rwanda, the former Yugoslavia, and some other countries in the 1990s somewhat motivated new perceptions of humanitarian intervention. Against those opponents of humanitarian intervention, especially military intervention, then Secretary-General Kofi Annan contended that, although he agreed that the principles of sovereignty and noninterference could “offer vital protection to small and weak states” and humanitarian intervention was “a sensitive issue, fraught with political difficulty and not susceptible to easy answers,”⁶⁵ he posed the serious question that “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”⁶⁶ Annan acknowledged that international society faced a dilemma, but he firmly argued:

But surely no legal principle—not even sovereignty—can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people

⁶² See Brendan Simms and D. J. B. Trim, *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press, 2011).

⁶³ See UN General Assembly, Sixty-third session, 98th plenary meeting, Official Records, A/63/PV.98, at 23.

⁶⁴ See Jerome Alan Cohen and Hungdah Chiu, at 1493.

⁶⁵ See Report of the Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, A/54/2000, March 27, 2000, paras. 217, 219.

⁶⁶ *Id.*, para. 219.

everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished.⁶⁷

As a response to the “Annan Question,” the government of Canada, in September 2000, announced the establishment of an independent International Commission on Intervention and State Sovereignty (ICISS), which was given a mandate to “build a broader understanding of the problem of reconciling intervention for human protection purpose and sovereignty.”⁶⁸ In December 2001, the ICISS published a report entitled, *Responsibility to Protect*. Although the ICISS noted “the long history, and continuing wide and popular” usage of the phrase “humanitarian intervention,” it made “a deliberate decision” not to adopt that term, but rather to refer to the “responsibility to protect” (R2P).⁶⁹ This change of the language does not “change the substantive issues which have to be addressed,” and thus those questions that were previously debated in the context of humanitarian intervention remain to be answered, but it provides a “new perspective,” which makes it much easier to answer those questions.⁷⁰ The fundamental ideology underlying the R2P is to reconceptualize sovereignty. That is, sovereignty should no longer merely be conceptualized as “authority” or “power” as it was before; instead, it also implies “responsibility.”⁷¹ Therefore, according to the report, where a population in a state is suffering from “serious harm” and that state is “unwilling or unable” to stop it, the principle of nonintervention should yield to the international R2P.⁷² The R2P has three pillars: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.⁷³ At the core of the R2P still appears the use of force.⁷⁴ Importantly, the ICISS Report suggested, in the case that the UN organs—in particular, the UN Security Council—would fail to act timely or effectively, regional organizations should have the power to initiate the international R2P.⁷⁵

The concept of R2P was accepted in the 2005 World Summit Outcome. Two important limitations were imposed, however. On the one hand, the circumstances that can trigger the R2P no longer broadly referred to “serious harm” in the ICISS’s R2P Report. Instead, they were explicitly confined to four

⁶⁷ *Id.*, para. 219.

⁶⁸ ICISS, *Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) 2.

⁶⁹ *Id.*, at 11.

⁷⁰ *Id.*, at 12.

⁷¹ *Id.*, at XI.

⁷² *Id.*, at XI.

⁷³ *Id.*, at 17–46.

⁷⁴ *Id.*, at 31–34; Report of the Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, A/54/2000, March 27, 2000, paras. 217, 219.

⁷⁵ ICISS, *Responsibility to Protect*, at 53–55.

circumstances: genocide, war crimes, ethnic cleansing, and crimes against humanity. In addition, it was also stated that the R2P should be decided within the UN in accordance with the UN Charter, including Chapter VII.⁷⁶ That is, unlike in the ICISS's R2P Report, regional organizations and individual states are not allowed to launch R2P actions on their own. Nevertheless, many countries were alert to the R2P. Thus, during debates on the first resolution of the R2P within the UN General Assembly in 2009,⁷⁷ many countries claimed that the R2P should not be abused.⁷⁸ As a matter of fact, apart from several UNSC resolutions were adopted in 2006,⁷⁹ the R2P has not appeared in other UNSC resolutions. The important thing, however, is that the concept of R2P does justify UN actions based on humanitarian consideration, which is beyond the traditional role of international law to simply secure international peace and security among states.

Many observers may be surprised to learn that China, in China's Position Paper on the UN Reform (2005), several months ahead of the 2005 World Summit Outcome, accepted the concept of the R2P. The position paper provides:

- Each state shoulders the primary responsibility to protect its own population. However, internal unrest in a country is often caused by complex factors. Prudence is called for in judging a government's ability and will to protect its citizens. No reckless intervention should be allowed.
- When a massive humanitarian crisis occurs, it is the legitimate concern of the international community to ease and defuse the crisis. Any response to such a crisis should strictly conform to the UN Charter and the opinions of the country and the regional organization concerned should be respected. It falls on the Security Council to make the decision in the frame of UN in light of specific circumstances which should lead to a peaceful solution as far as possible. Wherever it involves enforcement actions, there should be more prudence in the consideration of each case.⁸⁰

According to the Position Paper (2005), the R2P should be decided by the UNSC, but the position paper does not impose limitations on the circumstances

⁷⁶ 2005 World Summit Outcome, paras. 138, 139.

⁷⁷ General Assembly, 63/308. The Responsibility to Protect, A/RES/63/308, October 7, 2009.

⁷⁸ See General Assembly, 97th plenary meeting, July 23, 2009, Official Records, A/63/PV.97; 98th plenary meeting, July 23, 2009, Official Records, A/63/PV.98; 98th plenary meeting, July 24, 2009, Official Records, A/63/PV.99; 100th plenary meeting, July 28, 2009, Official Records, A/63/PV.100.

⁷⁹ See, e.g., UNSC, Resolution 1674 (2006), April 28, 2006, S/RES/1674 (2006); Resolution 1706 (2006), August 31, 2006, S/RES/1706 (2006).

⁸⁰ China's Position Paper on the UN Reform (2005), Part III.1.

triggering the R2P as the 2005 World Summit Outcome would do. Rather, it broadly refers to “human crisis.” This raises the important question of why China so hastily accepted the R2P. As a matter of fact, China had never accepted any concept proposed by any international organizations—let alone international NGOs—so quickly. There might be four reasons. First, China, as a permanent member of the UNSC, is required to shoulder more responsibilities to prevent and stop a humanitarian crisis.⁸¹ Second, as China rises, it seeks to protect its rapidly expanding interests around the world, especially those in fragile countries. Third, the R2P gives China a justification to give the green light to UN actions based on humanitarian reason without explicitly compromising its policy of nonintervention and accepting humanitarian intervention. The last and perhaps the most explanatory reason might be that China initially did not have a proper understanding of the R2P.

It appears that China soon found that the Position Paper (2005) went too far. Therefore, China changed its tune during the debates on the first UNGA resolution on R2P in 2009.⁸² China contended that the R2P remained “a concept” and did not constitute “a norm of international law.”⁸³ China was of the view that “the international society can provide assistance, but the protection of citizen [of a State] ultimately depends on the Government of that State.”⁸⁴ Unlike in the Position Paper (2005), China clearly stated that only the four circumstances specified in 2005 World Summit Outcome could trigger the R2P.⁸⁵ Furthermore, China warned that the implementation of R2P “should not contravene the principle of state sovereignty and the principle of non-interference in the internal affairs of States” and that the R2P should be prevented from “becoming a kind of humanitarian intervention.”⁸⁶ In particular, China emphasized that “no states must be allowed to unilaterally implement R2P.”⁸⁷ It thus is suggested that China turned to embrace a new approach of “responsible protection,”⁸⁸ which was first proposed by Brazil with an aim to complement the conception of R2P initially proposed by the ICISS and obviously supported by Western countries like the U.S.⁸⁹

⁸¹ See David H. Shinn, China and the Conflict in Darfur, 16 *Brown J. World Aff.* 85 (2009) 91–93.

⁸² General Assembly, 98th plenary meeting, July 23, 2009, Official Records, A/63/PV.98, at 23–24.

⁸³ *Id.*, at 24.

⁸⁴ *Id.*, at 23.

⁸⁵ *Id.*, at 23.

⁸⁶ *Id.*, at 23.

⁸⁷ *Id.*, at 23.

⁸⁸ Andrew Garwood-Gowers, China’s “Responsible Protection” Concept: Reinterpreting the Responsibility to Protect (R2P) and Military Intervention for Humanitarian Purposes, 6 *Asian JIL* 89 (2016) 91.

⁸⁹ Responsible While Protecting: Elements for the Development and Promotion of a Concept, letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, UN Doc. A/66/551 (2011).

Obviously, China's approach to the R2P is significant because, as a permanent member of the UNSC, China has the power to veto nearly all initiatives within the UNSC. As a matter of fact, over the past decade, China has often vetoed what it viewed as coercive initiatives allegedly proposed to stop humanitarian crisis in countries like Sudan,⁹⁰ Zimbabwe,⁹¹ and Syria.⁹² However, China's recent votes in the UNSC show that it actually embraces, albeit with caution, the R2P.⁹³ For instance, but for China's support, none of UNSC resolutions against Sudan⁹⁴ or Libya,⁹⁵ where China has a huge economic interest, were likely to be adopted. Furthermore, China reportedly used economic leverage to press Sudan to change its policy in Darfur, including discouraging Chinese corporations to invest in Sudan and removing Sudan's preferred trade status.⁹⁶ On the other hand, China remains alert to the concern that the R2P will be abused. Thus, China stressed several times that the relevant UNSC resolutions toward Libya were too broadly interpreted by some countries to justify their undue actions.⁹⁷ In light of this, China, together with Russia, blocked several initiatives against Syria in accordance with Chapter VII of the UN Charter, which was fiercely denounced by several countries, such as the U.S.⁹⁸ In particular, China opposes humanitarian coercive actions without the approval of the UNSC.⁹⁹

Obviously, the real benefit to countries like the U.S. from the R2P is to justify their potential military actions. By contrast, China obviously is more concerned with the first and third pillars of the R2P, which is arguably a major reason why

⁹⁰ "U.N. Vote on Sudan Could Face China Veto," available at <http://www.foxnews.com/story/0,2933,132803,00.html> (last visited May 15, 2019).

⁹¹ "2 Vetoes Quash U.N. Sanctions on Zimbabwe" (July 12, 2008), available at <http://www.nytimes.com/2008/07/12/world/africa/12zimbabwe.html?pagewanted=all>.

⁹² "Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China," available at <https://www.un.org/press/en/2011/sc10403.doc.htm> (last visited May 15, 2019).

⁹³ See Sarah Teitt, *China and the Responsibility to Protect*, Asian-Pacific Centre for the Responsibility to Protect (December 19, 2008) 11–17, 18–20.

⁹⁴ See, e.g., Security Council Resolution 1713(2006), September 29, 2006; Security Council Resolution 1755 (2007), April 30, 2007; and Security Council Resolution 1769 (2007), July 31, 2007.

⁹⁵ See Security Council, Resolution 1973 (2011), February 26, 2011; Security Council, Resolution 1973 (2011), March 17, 2011.

⁹⁶ Chin-Hao Huang, U.S.-China Relations and Darfur, 31 *Fordham Int'l L.J.* 827 (2007–2008) 837, 838.

⁹⁷ See, e.g., Speech of Chinese Ambassador Li Baodong at the UNSC open debate on the Protection of Civilians in Armed Conflict, UN Doc. S/PV.6531, May 10, 2011, at 20–21.

⁹⁸ Euan McKirdy, "8 times Russia blocked a UN Security Council resolution on Syria" (April 13, 2017), available at <https://edition.cnn.com/2017/04/13/middleeast/russia-uns-c-syria-resolutions/index.html>.

⁹⁹ For instance, on the comment on the missile strikes launched by the U.S., France, and the U.K. against Syria in April 2018, the spokesperson said that the use of force on the ground of unilateral "humanitarian interference" bypassing the Security Council did not conform to international law. Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 16, 2018, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1551458.shtml.

many developing states that were highly critical of humanitarian intervention accepted the R2P in the 2005 World Summit Outcome. Thus, it can be argued that China and such states as the U.S. cooperate with each other to realize all three pillars of the R2P.¹⁰⁰

In addition, although China, as a permanent member of the UN Security Council and a rising power, can reshape the conception of the R2P and, in particular, effectively affect to what extent the R2P will be enforced, the fact that China, in debates on the first R2P resolution at the UN General Assembly in 2009, turned to a more conservative attitude to the R2P, which was initially in China's Position Paper on the UN Reform (2005) implies that China largely remains a norm taker.

3.1.2 China and International Sanctions

Traditionally, China was critical of international sanctions, including those authorized by international organizations and, in particular, those unilaterally imposed by individual countries. There are three major reasons. First, China persisted in a principled policy that international disputes should be settled with peaceful means instead of coercive sanctions. Second, international sanctions are susceptible to being maneuvered and disguised by powerful states as tools to intervene in the internal affairs of less powerful states and to pursue the narrow national interests of powerful states. Third, China itself was a major target of international sanctions by some Western countries, including the U.S.¹⁰¹

Although China always claims that sanctions cannot resolve the problems but rather only worsen the situation, China, as a permanent member of the UN Security Council, had never vetoed any UN sanctions initiatives until the late 1990s. For instance, China abstained from casting votes when the UNSC debated on Resolutions 757 and 1244 against the Federal Republic of Yugoslavia,¹⁰² Resolution 929 against Rwanda,¹⁰³ and Resolution 1134 against Iraq.¹⁰⁴ A few major factors can help explain China's abstentions. Firstly, China may have been aware that it was not powerful enough to challenge the U.S. and other like-minded countries. Secondly, China did not have substantial interests in the target states. However, this reason may not fully explain the issue because

¹⁰⁰ Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 *Eur. J. Int'l L.* 755 (2013) (hereinafter "Congyan Cai (2013)") 790 at 790.

¹⁰¹ See Dianne E. Rennack, *China: Economic Sanctions*, CRS Report for Congress (February 1, 2006), available at <https://www.fas.org/sgp/crs/row/RL31910.pdf>.

¹⁰² UNSC Res. 757, May 30, 1992, UN Doc. S/RES/757; UNSC Res. 1244, June 10, 1999, UN Doc. S/RES/1244.

¹⁰³ UNSC Res. 929, June 22, 1994, UN Doc. S/RES/929.

¹⁰⁴ UNSC Res. 1134, October 23, 1997, UN Doc. S/RES/1134.

China, based on its established policies of noncolonization, supported and imposed sanctions against South Africa for its apartheid.¹⁰⁵

In the twenty-first century, international sanctions have become a more important concern for China and, in turn, China's position has been more relevant for countries considering international sanctions. Firstly, there have been increased expectations that China should shoulder more responsibility in maintaining international peace and security by either preventing or supporting international sanctions. Secondly, China has continuously expanded its interests in some countries which often are targets of sanctions. For instance, many sanction initiatives are targeted at countries like North Korea and Iran with which China maintains strategic relations. Thirdly, the UN has improved the sanction regime and mechanism.¹⁰⁶ For instance, in order to reduce undue constraints and damages on targeted states, the UN has tended to initiate targeted sanctions or "smart sanctions" rather than comprehensive sanctions. Furthermore, humanitarian concerns have been given more consideration. The improved sanction regime and mechanism reduces the legitimacy of opposing international sanctions.

China updates its policy of international sanctions as it continues its rise as a great power. China's Position Paper on the UN Reform (2005) states:

- China has always maintained that sanctions should be applied with prudence on the precondition that all peaceful means have been exhausted. Once the Security Council decides to impose sanctions, all countries are obliged to comply strictly.
- China is in favor of improving the sanctions mechanism of the UN, setting a strict criterion, making it well focused, setting explicit time limits and minimizing the possibility of humanitarian crisis arising from sanctions and its impact on the third country. The committees on sanction should regularly evaluate the humanitarian impact of sanctions
- The international community should help developing countries build capacity for sanctions implementation.¹⁰⁷

Although China still maintains that sanctions are "not an end in themselves,"¹⁰⁸ China appears to have placed more emphasis on how international sanctions will be implemented in practice. It claims that

¹⁰⁵ See, e.g., S/RES/591 (1986), November 28, 1986; S/RES/581(1986), February 13, 1986.

¹⁰⁶ See generally Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007).

¹⁰⁷ China's Position Paper on the UN Reform (2005), Part II.6.

¹⁰⁸ Report of China on Implementation of United Nations Security Council Resolution 1718 (2006), January 30, 2008, UN Doc. S/AC.49/2006/21, at 3.

international sanctions must be implemented “in a comprehensive and balanced manner.”¹⁰⁹ For this purpose, China supports the reform of the sanction regime and mechanism as stated in the Position Paper (2005). Importantly, China stresses that “all countries are obliged to comply strictly” with sanctions approved by the UNSC.

China enforces sanctions-related UN resolutions in two ways. Firstly, the relevant UN resolutions are rewritten into Chinese laws. For instance, the circular issued by the MFA to implement Resolution 1373 summarizes the content of that resolution and adds it as an annex.¹¹⁰ Secondly, the relevant UN resolutions are directly incorporated into Chinese laws. For instance, on February 14, 2014, the Ministry of Transport (MOT) issued a circular for the implementation of UNSC Resolutions 2125 and 2134,¹¹¹ providing directly that Chinese authorities must “take measures to strictly implement the mentioned resolutions aimed to honor the international obligations that China bears.”¹¹² However, two concerns have been raised. Primarily, in light of the silence of China’s constitution on the status of international law in Chinese legal order, there is no constitutional basis for China’s governmental organs to automatically incorporate the relevant UNSC resolutions.¹¹³ In that same vein, some of China’s governmental organs appear to have gone too far in implementing the relevant UNSC resolutions. For instance, UNSC Resolution 1526 merely “[c]alls upon” states to cut the flows of funds and other financial assets and economic resources to suspected individuals and entities, which means that this provision is not legally obligatory.¹¹⁴ However, the circular issued by the MFA to implement that resolution definitely requires such kinds of flows of funds to be “decisively cut off.”¹¹⁵

Many governmental and nongovernmental organs are involved in the implementation of UN sanctions. The Chinese legislature and judiciary play a minor role in this regard. Neither the National People’s Congress (NPC) or the National People’s Congress Standing Committee (NPCSC) have created a general legal framework for the implementation of UNSC resolutions, nor have they enacted

¹⁰⁹ Report of China on Implementation of United Nations Security Council Resolution 1718 (2006), January 30, 2008, UN Doc. S/AC.49/2006/21, at 3.

¹¹⁰ MFA of China, Circular Concerning the Implementation of UNSC Resolution 1373, September 30, 2001 (in Chinese).

¹¹¹ UNSC Resolution 2125 (2013), November 18, 2013, SC/11177; UNSC, Resolution 2134 (2014), January 28, 2014, S/RES/2134 (2014).

¹¹² MOT of China, Circular Concerning the Implementation of the UN Resolution 2125 and Resolution 2134, February 14, 2014 (in Chinese). However, the circular simply provided the links to UN Resolutions 2125 and 2134.

¹¹³ Yifeng Chen, A Preliminary Review on the Mechanisms for the Implementation of UNSC Resolutions in China, *Chinese Y.B. Int’l L.* 333 (2012) 343 (in Chinese).

¹¹⁴ UNSC Res. 1526, January 30, 2004, UN Doc. S/RES/1526 (2004).

¹¹⁵ Chen Yifeng, at 346–347; UNSC Res. 1526, January 30, 2004, S/RES/1526 (2004).

any law to implement specific UNSC sanction resolutions. Similarly, there has been no report that any disputes in relation to UN sanctions were submitted to Chinese courts. The executive branch, especially the MFA, is the authority responsible for the implementation of UN sanctions. The MFA has adopted many instruments to help provide guidance for other governmental organs to implement the UNSC sanctions. Also, the MFA, through the consultation, helps other governmental organs understand and implement UN sanctions. For instance, the circular issued by the MFA to implement UNSC Resolution 1526 provides that “if fundamental policy concerns arise in the implementation [of the Resolution], the Ministry of Foreign Affairs may be consulted timely.” However, several other ministerial organs have their own implementation measures. For instance, although the MFA did not take any actions related to UNSC Resolutions 2125 and 2134, the MOT adopted a circular to implement those resolutions and did not even mention how it would coordinate with the MFA.

Private actors are also involved in the implementation of UN sanctions. For instance, in a circular concerning the implementation of UN sanctions resolutions adopted in January 2010, the China Banking Regulatory Commission (CBRC) required commercial banks, in addition to local branches of the CBRC, to take effective measures to implement those resolutions.¹¹⁶ Also, on September 24, 2007, the MOC issued a note to foreign traders, requiring that they “learn seriously and know timely the content” of UNSC Resolutions 1737 and 1747.¹¹⁷

As indicated previously, China has always been critical of unilateral sanctions. China has repeatedly affirmed that it opposes any unilateral sanctions adopted by a state based on its own domestic law.¹¹⁸ As Reilly observed, however, China indeed is a regular initiator of sanctions.¹¹⁹ While China’s sanctions would not create substantial threats to a country as powerful as the U.S., they work well toward less powerful states, for instance, the U.S.’s allies in the Asia.¹²⁰ Furthermore, unlike the U.S., which often invokes, rhetorically at least, international law to justify its sanctions, China “simply points to its own national interests.”¹²¹ Moreover, while China has adopted laws for the implementation

¹¹⁶ China Banking Regulatory Commission, Circular Concerning the Enhancing the Management of Bank Accounts with the Aim to Effectively Implement the Relevant UN Resolutions of Sanctions, January 1, 2010 (in Chinese).

¹¹⁷ MOC of China, Notice Concerning Reminding Foreign Traders of Knowing the Content of UNSC Resolutions, September 24, 2007 (in Chinese).

¹¹⁸ For instance, the spokesperson of the MFA argued that China “firmly opposes the US imposing unilateral sanctions and ‘long-arm jurisdiction’ on Chinese entities or individuals in accordance with its domestic laws.” Foreign Ministry Spokesperson Geng Shuang’s Remarks (February 24, 2018), available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1537359.shtml.

¹¹⁹ James Reilly, China’s Unilateral Sanctions, 34 (4) *Wash. Q.* 121 (2012) 121.

¹²⁰ *Id.*

¹²¹ *Id.*, at 124.

of the UN sanctions decisions, no Chinese laws explicitly allow unilateral sanctions. Therefore, the legal basis and procedure surrounding unilateral sanctions are opaque and legal remedies are rarely available to those impacted entities. Reilly thus suggested that, China, unlike the U.S. which enacts sanctions in accordance with domestic law and/or presidential decisions, imposes “virtual sanctions.” That is, China “rarely openly declares its economic sanctions”; instead, it “prefers to use vague threats, variation in leadership visits, selective purchases (or non-purchases), and other informal measures.”¹²² Nevertheless, in recent years, China has openly acknowledged that it imposes sanctions. For instance, in February 2010, China declared it was imposing sanctions against American companies that were involved in arms sales to Taiwan. China argued that the decision to impose sanctions was “reasonable.”¹²³ Again, in December 2015, China threatened sanctions against American companies participating in arms sales to Taiwan.¹²⁴ This implies that, as China rises, it has become more confident in employing unilateral sanctions when it deems it necessary.

Given that China has huge geopolitical interests in the Korean Peninsula and ideological proximity to North Korea, in particular because the treaty of friendship and mutual assistance between China and North Korea (1961) remains effective, China’s position toward sanctions against North Korea warrants special scrutiny. As a matter of fact, China has often been blamed for blocking the UN sanctions initiatives against North Korea and for causing the failure of the full implementation of approved UN sanctions. As examined in the following paragraphs, however, it should be said that those accusations are not well-founded.

After North Korea conducted its first nuclear test on October 9, 2006, the MFA of China immediately issued a statement, condemning North Korea as having defied the entirety of international society.¹²⁵ China sternly requested that North Korea honor its commitment to denuclearization and take no action to further deteriorate circumstances.¹²⁶ This was presumably the first time China criticized North Korea in such a strong manner. On October 14, 2006, China supported the adoption of UNSC Resolution 1718, in accordance with

¹²² *Id.*, at 123.

¹²³ “MFA: It is reasonable to impose sanctions against American companies involved in arms sales to Taiwan” (February 2, 2010), available at <http://finance.sina.com.cn/roll/20100205/01397371651.shtml>.

¹²⁴ “China Threatens Sanctions over US Arms Sale to Taiwan” (December 17, 2015), available at <https://www.voanews.com/a/china-issues-angry-protest-over-us-arms-sale-to-taiwan/3106891.html>.

¹²⁵ See Joel Wuthnow, *Chinese Diplomacy and the UN Security Council* (London: Routledge, 2013) 67.

¹²⁶ MOFA of the PRC, Statement of the Ministry of Foreign Affairs of the People’s Republic of China, October 9, 2006.

which an arms embargo, luxury goods embargo, and assets freeze measures were approved.¹²⁷

In the UNSC's meeting debating on Resolution 1718, China's permanent representative to the UN stated that China supported the UNSC making a "firm and appropriate response."¹²⁸ According to China, the resolution indicated "the firm position of the international community."¹²⁹ Although China did not "approve of the practice of cargo inspection to and from" North Korea, China did not exercise its right to veto and only "strongly urge[d] the countries concerned to adopt a prudent and responsible attitude in this regard and to refrain from taking any provocative steps that may intensify the tension."¹³⁰ At the same time, China noted that the resolution should "help create enabling conditions for the final peaceful solution."¹³¹ In particular, China opposed a call for a military response under Chapter VII of the UN Charter but supported economic sanctions.¹³² China stressed that "sanctions themselves are not the end," and they may be suspended or lifted if North Korea would comply with that resolution.¹³³

On May 25, 2009, North Korea announced another nuclear test. Once again, China expressed its strong opposition,¹³⁴ and supported the adoption of UNSC Resolution 1874.¹³⁵ China claimed that the UNSC Resolution 1874 was "in line with Article 41" of the UN Charter.¹³⁶ At the same time, China stressed that "the sovereignty, territorial integrity and legitimate security concerns and development interests" of North Korea "must be respected."¹³⁷ China argued that "under no circumstances should force be used or threatened" and that North Korea's "economic viability or the development" and the "delivery of humanitarian assistance" to that country should not be negatively affected.¹³⁸ Finally, China maintained that, if North Korea would comply with the resolution, the UNSC would "review the appropriateness of suspending or lifting the measures it has imposed."¹³⁹

¹²⁷ UNSC Res. 1718.

¹²⁸ UNSC 5551st Meeting (October 14, 2006) UN Doc. S/PV.5551, 4 (Mr. Wang Guangya of China).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*; UNSC Press Release, Security Council Condemns Nuclear Test by Democratic People's Republic of Korea, Unanimously Adopting Resolution 1718 (2006), October 14, 2006, SC/8853. Likewise, UNSC 6141st Meeting, June 12, 2009, UN Doc. S/PV.6141, 3 (Mr. Zhang Yesui of China).

¹³³ UNSC 5551st Meeting.

¹³⁴ "MFA: China's government firmly opposes another Nuclear Test by North Korea" (May 25, 2009), available at http://www.gov.cn/gzdt/2009-05/25/content_1324168.htm.

¹³⁵ UNSC Res. 1874, June 12, 2009, UN Doc. S/RES/1874.

¹³⁶ UNSC 6141st Meeting.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

In its annual report of the implementation of UNSC Resolution 1874, China agreed that all countries had “the duty accurately and conscientiously to implement resolution UNSC 1874 (2009) and the relevant decision of the Committee.”¹⁴⁰ China stressed, however, that the implementation of UN sanctions “should not influence the national development of the Democratic People’s Republic of Korea, its normal external contacts or the normal lives of its people, nor should it harm the normal relations of the Democratic People’s Republic of Korea with other countries.”¹⁴¹ China furthermore stressed that the UN sanctions should be reversible if North Korea would comply with that resolution.¹⁴²

When North Korea declared that it had conducted a third nuclear test on February 12, 2013, the MFA of China issued a statement almost identical to that issued in 2009. China again supported the UNSC in adopting another resolution. On March 27, 2013, the UNSC adopted Resolution 2094 with China’s support.¹⁴³ In commenting on the resolution, the MFA contended that China was committed to peacefully resolving the nuclear issue through dialogues and negotiations, and that therefore, the resolution was “balanced as a whole.”¹⁴⁴

On January 6, 2016, North Korea launched its fourth nuclear test. This led to the adoption of UNSC Resolution 2270.¹⁴⁵ The resolution is more vigorous than any previous one in that it targets the trade of raw materials that North Korea heavily relies on to sustain its fragile economy. According to the resolution, with very limited exceptions, North Korea is prohibited from supplying, selling, or transferring, directly or indirectly, coal, iron, and iron ore, and no state may procure such products from them. Furthermore, aviation fuel is not allowed to be sold or supplied to North Korea, with very limited humanitarian exceptions. Although China is the most important trade partner of North Korea, it promised the full enforcement of the resolution.¹⁴⁶

China has repeatedly expressed its determination to fully implement UN sanctions against North Korea. For instance, in order to implement UNSC Resolution 2094, on September 23, 2013, China’s several ministerial-level organs co-issued a notice concerning the prohibition on the export to North

¹⁴⁰ Report by China on Implementation of Security Council Resolution 1874 (2009), August 4, 2009, UN Doc. S/AC.49/2009/23, at 8.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ UNSC Res. 2094 (March 7, 2013) UN Doc. S/RES/2094.

¹⁴⁴ Xinhua, “The UNSC adopted a resolution against the nuclear test of North Korea” (March 7, 2013), available at http://news.xinhuanet.com/world/2013-03/07/c_124430590.htm.

¹⁴⁵ UNSC Res. 2270, SC/12267, March 2, 2016.

¹⁴⁶ “MFA: China Could Enforce UNSC Resolution 2270 in a Serious and Comprehensive Manner” (March 7, 2016), available at <http://news.qq.com/a/20160307/063685.htm> (in Chinese).

Korea of dual-use items and technologies which relate to weapons of mass destruction and their delivery vehicles.¹⁴⁷ In several reports submitted to the Sanctions Committee against North Korea concerning the implementations of UN sanctions, China maintained that it has “always rigorously implemented implements the UN sanctions.”¹⁴⁸

3.2. China and Development Regimes

3.2.1 China and the WTO Regime

Over the past three decades, no other international regimes have expanded China’s economic power as effectively as the WTO has done. In accordance with the WTO disciplines, Chinese traders enjoy nondiscriminatory treatment around the world, and China’s government can rely upon multilateral means to protect its trade interests. China’s trade volume has sharply increased. In 2013, China for the first time became the largest trade power, overtaking the U.S.¹⁴⁹ In 2017, China’s foreign trade volume reached US\$4.28 trillion.¹⁵⁰ China’s trade surplus has also dramatically expanded. In 2017, China’s trade surplus amounted to around US\$421.44 billion.¹⁵¹ However, in the past several years, trade disputes between China and some other trading powers have intensified, for instance, the eruption of a China-U.S. trade war in 2018.¹⁵² These trade disputes, especially a China-U.S. trade war, not only concern whether China has fully complied with its WTO obligations; more importantly, they have raised a serious concern as to whether new trade rules tailored to China’s trade regime are created. The WTO regime may be the best example to illustrate how an international regime enhances a rise of a great power, how a rising great power survives an international regime, and how an international regime is challenged by a rising great power.

¹⁴⁷ MOC, Ministry of Industry and Information Technology (MII), General Administration of Customs and China Atomic Energy Authority (CAEA), Notice Concerning the Prohibition on the Export of Dual-Use Items and Technologies to North Korea, September 23, 2013 (in Chinese).

¹⁴⁸ See, e.g., Report of China on the Implementation of Security Council Resolution 2094 (2013), October 30, 2013, UN Doc. S/AC.49/2013/25.

¹⁴⁹ “China surpasses US as world’s largest trading nation,” available at <https://www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation> (last visited May 15, 2019).

¹⁵⁰ “China’s foreign trade up 14.2% in 2017” (January 12, 2018), available at <http://www.chinadaily.com.cn/a/201801/12/WS5a582699a3102c394518ed29.html>.

¹⁵¹ “China: Trade balance from 2007 to 2017 (in billion U.S. dollars),” available at <https://www.statista.com/statistics/263632/trade-balance-of-china/> (last visited May 15, 2019). China contends that it has never pursued trade surplus intentionally, and the primary factors leading to trade surplus or trade deficit of a state include its economic structure and the international competitiveness of its products or services. China’s Foreign Trade (2011), Part IV; China and the WTO (2018), Part IV.1.

¹⁵² See in detail Chapter Seven, Section 4.

During the negotiations on China's accession to the WTO, many WTO Members acknowledged that China's accession "would contribute a strengthening of the multilateral trading system, enhancing the universality of the WTO, bring mutual benefits to China and the other Members of the WTO, and ensuring the steady development of the world economy."¹⁵³ Some other WTO Members asserted, however, that "because of the significant size, rapid growth and transitional nature" of the Chinese economy, "a pragmatic approach" should be taken in determining China's need for recourse to those special and differential (S&D) treatments provided in the WTO Agreement and available only to developing WTO Members.¹⁵⁴ It thus was required that "each agreement and China's situation should be carefully considered and specifically addressed."¹⁵⁵ In other words, WTO Members were aware that China had its own particularities and were doubtful about whether those particularities would be well handled by the WTO regime. As a result, China did not fully enjoy the S&D treatment. More importantly, China also had some "WTO-Plus" obligations imposed upon it.¹⁵⁶ That is, all those China-specific commitments "were solely those of China," which "would prejudice neither existing rights and obligations of Members under the WTO Agreement nor ongoing and future WTO negotiations and any other process of accession."¹⁵⁷ For instance, the China WTO Accession Protocol provides that, until China has established, "under the domestic law of the importing WTO Members" something considered to be a market economy or the market economy conditions prevail in a particular industry or sector, an importing WTO Member has the right to apply a special methodology in making subsidies and dumping determinations¹⁵⁸ which disadvantages Chinese traders. This is the famous "non-market economy" provision. This implies that China should not only comply with the WTO disciplines but also satisfy the domestic laws of other WTO Members concerning dumping and subsidies. Although China assumed that its accession to the WTO adhered to the basic principle of "the achievement of balance between rights and obligations,"¹⁵⁹ some Chinese commentators have

¹⁵³ Report of the Working Party on the Accession of China, WT/ACC/CHN/49, October 1, 2001, para. 5.

¹⁵⁴ *Id.*, para. 9.

¹⁵⁵ *Id.*, para. 9.

¹⁵⁶ See generally Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of China Accession Protocol, 37 (3) *J. World Trade* 483 (2003).

¹⁵⁷ Report of the Working Party on the Accession of China, para. 9.

¹⁵⁸ Protocol on the Accession of the People's Republic of China, WT/L/432, November 23, 2001, para. 15(a) and (d).

¹⁵⁹ Report of the Working Party on the Accession of China, para. 12.

contended that these “WTO-plus” obligations were highly unfair and are detrimental to China.¹⁶⁰

China, during the WTO accession negotiations, acknowledged that its trade regime was far from being consistent with WTO disciplines. For instance, the intellectual property protection regime in China was at the “initial stage of its development.”¹⁶¹ China, however, pledged that the WTO disciplines would be abided by.¹⁶² Furthermore, China undertook to improve its monetary and fiscal policy, investment policy, industry policy, and so on,¹⁶³ which, generally speaking, are beyond the WTO domain. Thus, these undertakings do not constitute China’s WTO obligations. Moreover, China expressed the intention to negotiate other trade disciplines, for instance, the Agreement on Government Procurement (GPA).¹⁶⁴ However, some WTO Members doubted whether China would fully implement its WTO obligations. Some WTO Members thus rejected China’s claim that WTO Members should eliminate all discriminatory nontariff measures against China from the date of China’s accession. They argued that such measures needed not to be phased out until China’s foreign trade regime “fully conformed to WTO obligations.” As a compromise, it was agreed that all those measures inconsistent with the WTO Agreement would be listed in Annex 7 to the China WTO Accession Protocol and “would be phased out or otherwise dealt with in accordance with the mutually agreed terms and timetable as specified in said annex.”¹⁶⁵

Compliance with WTO obligations is highly demanding for a transitional economy like China.¹⁶⁶ According to China, it continually makes extraordinary efforts to modernize its legal system, lower tariffs and reduce nontariff measures, liberalize market access, and create a level playing field.¹⁶⁷ For instance, since 2010 over 2,300 laws at the central governmental level and 190,000 measures at the local level were repealed or amended.¹⁶⁸ In China’s Foreign Trade (2011) a White Paper issued on the eve of the tenth year of WTO accession,

¹⁶⁰ See, e.g., Naigeng Zhang, On the Amendment of Constitutional Procedures to Ratify Treaties, 2004 (1) *Pol. & L.* 17 (2004) 18 (in Chinese).

¹⁶¹ Report of the Working Party on the Accession of China, para. 251.

¹⁶² See, e.g., China’s WTO Accession Protocol, para. 342 and Annexes. See also Report of the Working Party on the Accession of China.

¹⁶³ Report of the Working Party on the Accession of China, paras. 24, 41, and 171.

¹⁶⁴ *Id.*, para. 374.

¹⁶⁵ *Id.*, paras. 243, 244. See also China’s WTO Accession Protocol, para. 17.

¹⁶⁶ China argued that most Chinese industries faced great difficulties when China acceded to the WTO regime. China and the World Trade Organization (2018), Part I.6.

¹⁶⁷ The Information Office of the State Council of China, China’s Foreign Trade, December 2011 (hereinafter “China’s Foreign Trade (2011)”, Part II, available at <http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1060560/1060560.htm>). See also China and the WTO (2018), Part I.

¹⁶⁸ China and the WTO (2018), Part I.1.

China stated that “by 2010, all of China’s commitments made upon entry into the WTO had been fulfilled.”¹⁶⁹

On the other hand, China claims that other WTO Members should also fully respect their WTO obligations toward China but are not doing so. At the core of these WTO obligations concerns is the aforesaid “non-market economy” provision in China’s WTO Accession Protocol. That provision provides a special methodology for determining the existence of dumping or subsidy, but it also sets forth a “sunset day.” That is, “in any event,” the provision “shall expire 15 years” after the date of China’s accession,¹⁷⁰ namely, December 11, 2016. However, the EU approved Regulation 2016/1036, providing that the EU Commission, in calculating the normal value of a specific product, maintains the “non-market economy” methodology toward China.¹⁷¹ China claimed that the EU, by adopting that regulation, failed to comply with its WTO obligation. In December 2016, China required the EU, pursuant to Article 4 of the DSU, to enter into consultation as to the relevant measures in Regulation 2016/1036. China argued that Paragraph 15(d) of the China WTO Accession Protocol should automatically cease to apply from December 11, 2016.¹⁷² Both the EU and China deem this case critical: the EU contends it is “the most important live issue in WTO anti-dumping law”; China argues that it is “especially important to China, not only legally, but also economically and politically.”¹⁷³ According to Zhang Xiangchen, China’s ambassador to the WTO, China need not meet any so-called “market economy” criteria set forth by the EU, the U.S., or any other WTO Member after December 11, 2016, and shall enjoy “the same rights as other WTO Members in anti-dumping proceedings.”¹⁷⁴ In other words, China claims that it should be treated as a “normal” WTO Member in the field of trade remedy at least.

As of April 2018, China has been a respondent in twenty-seven cases, twenty-three of which have been decided.¹⁷⁵ In nearly all decided cases, China has been found, to different degrees, inconsistent with its WTO obligations.¹⁷⁶

¹⁶⁹ China’s Foreign Trade (2011), Part II.

¹⁷⁰ China’s WTO Accession Protocol, para. 15(d).

¹⁷¹ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Official Journal of the European Union, L 176, 30.6.2016, art. 2(7).

¹⁷² European Union—Measures Related to Price Comparison Methodologies, WT/DS516/1, December 15, 2016.

¹⁷³ Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the dispute: *European Union—Measures Related to Price Comparison Methodologies* (DS516) (December 6, 2017), available at <http://wto.mofcom.gov.cn/article/xwfb/201712/20171202684580.shtml> (last visited January 2018).

¹⁷⁴ *Id.*

¹⁷⁵ China and the WTO (2018), Part II.2.

¹⁷⁶ Yenkong Ngangjoh Hodu and Zhang Qi, *The Political Economy of WTO Implementation and China’s Approach to Litigation in the WTO* (Northampton: Elgar, 2016) 133–177.

This illustrates that China's factual compliance with WTO obligations is not as good as it proclaims in China's Foreign Trade (2011). Some WTO Members hold an even more negative evaluation of China's WTO compliance. For instance, the U.S. has expressed its disappointment with China's WTO compliance. While acknowledging that China has made many efforts to implement its WTO obligations,¹⁷⁷ the U.S. complains that China still fails to comply with the WTO Agreement in many respects, including in the areas of intellectual property protection and state subsidies.¹⁷⁸ More importantly, several trading powers go further and argue that China's economic model runs against the "open, market-oriented policies" on which the multilateral trade system is based, which has a substantially negative effect on other WTO Members and the WTO regime.¹⁷⁹ The U.S. argues that this situation has escalated as China's government and the CCP arguably strengthen their involvement in the Chinese economy and corporate operations after President Xi Jinping took the state leadership.¹⁸⁰ According to the U.S., it is China's WTO noncompliance and, more generally, its economic model that create China's huge trade surplus.¹⁸¹

In the view of some WTO Members, China poses challenges to the WTO regime that many other WTO Members cannot. Firstly, China is too powerful to be effectively contained by the WTO. In other words, such a trading power like China can find it beneficial to defy WTO disciplines if it wants. The U.S. Trade Representative (USTR) states:

Indeed, it is simply unrealistic to believe that WTO enforcement actions alone can ever have a significant impact on an economy as large as China's economy, unless China's government is truly committed to market-based competition.¹⁸²

More importantly, some WTO Members have recognized that some aspects of China's trade regime and, more generally, China's economic model, which are highly relevant to the rapid expansion of China's trading power, are poorly regulated by or remain beyond WTO disciplines in force. Therefore, some WTO Members propose that new "China-specific" WTO disciplines should be considered again as they were in the negotiations of China's WTO

¹⁷⁷ USTR, 2016 Report to the Congress on China's WTO Compliance, January 2017, at 3; USTR, 2018 Report to the Congress on China's WTO Compliance, February 2019, at 8.

¹⁷⁸ 2018 Report to the Congress on China's WTO Compliance, at 11–19; China's Trade-Disruptive Economic Model, Communication from the United States, WT/GC/W/745, July 16, 2018, at 2–3.

¹⁷⁹ China's Trade-Disruptive Economic Model, at 2, 7.

¹⁸⁰ China's Trade-Disruptive Economic Model, at 2.

¹⁸¹ USTR, 2017 Report to Congress on China's WTO Compliance, at 4.

¹⁸² USTR, 2017 Report to Congress on China's WTO Compliance, at 5.

accession. In a joint statement jointly issued in May 2018, the U.S., the EU, and Japan stated, without naming China, that non-market-oriented policies and practices, among others, “create unfair competitive conditions for our workers and businesses, . . . , undermine the proper functioning of the international trade.”¹⁸³ They agreed to accelerate the discussion regarding “possible new rules on industrial subsidies and SOEs.”¹⁸⁴ In particular, they propose some criteria of market conditions.¹⁸⁵ In the Proposals on WTO Modernization issued in July 2018, the EU suggested that new rules should be considered to improve transparency and subsidy notification, to better regulate SOEs and the most trade-distortive types of subsidies, and to address access barriers, discriminatory treatment of foreign investors and behind border distortions, and so on.¹⁸⁶ In a word, according to Shea, U.S. ambassador to the WTO, “change is necessary if the WTO is to remain relevant to the international trading system.”¹⁸⁷

However it is more difficult, if not impossible, for other WTO Members to craft new “China-specific” provisions within the WTO as they did before because, given the consensus-based approach to trade negotiations established in the WTO Agreement,¹⁸⁸ China can readily frustrate any initiative of that kind. As a matter of fact, the U.S. admits that “the WTO itself does not currently provide the tools needed to bring about that change.” Therefore, “the best solution from a WTO perspective is for China finally to take the initiative to fully and effectively embrace open, market-oriented policies like other WTO Members.”¹⁸⁹ For the part of China, Zhang Xiangchen, China’s ambassador to the WTO, argues that the WTO is not the appropriate place to discuss the economic models of WTO Members.¹⁹⁰ This does not mean, however,

¹⁸³ Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (hereinafter “Trilateral Statement (2018)”) and Annex 1 (May 31, 2018), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting>; Joint Statement of the Trilateral Meeting of the Trade Ministers of the European Union, Japan and the United States (January 9, 2019), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/joint-statement-trilateral-meeting>. See also China’s Trade-Disruptive Economic Mode, at 2.

¹⁸⁴ Trilateral Statement (2018).

¹⁸⁵ Trilateral Statement (2018), Annex 3.

¹⁸⁶ EU Commission, EU’s Proposals on WTO Modernization, WT 8329/2019 INIT, Brussels, July 5, 2018, at 2–4.

¹⁸⁷ Statement Delivered by Ambassador Dennis Shea, WTO General Council, Geneva, July 26, 2018 (hereinafter “Ambassador Shea’s Statement of July 26, 2018”), available at <https://geneva.usmission.gov/2018/07/27/55299/>.

¹⁸⁸ See Marrakesh Agreement Establishing the World Trade Organization, art. 9 (1).

¹⁸⁹ Ambassador Shea’s Statement of July 26, 2018.

¹⁹⁰ Statement by H.E. Ambassador Zhang Xiangchen at the WTO General Council Meeting (July 26, 2018) (hereinafter “Ambassador Zhang Xiangchen’s Statement of July 26, 2018”), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoin/201807/20180702770676.shtml>. Ambassador Zhang was of opinion that “we can’t find the definition of ‘market economy’ throughout the WTO rule book. There is no one-size-fits-all ‘market economy’ standard in the world. The WTO rules

that China will decline to take the initiative of negotiating more disciplines on subsidy, SOEs, industry policy, and so on. New “China-specific” provisions are likely to be negotiated within the WTO, even though they might not explicitly name China as the Report of the Working Party on the Accession of China and China’s WTO Accession Protocol did a decade ago. Importantly, if the initiatives of “China-specific” disciplines are blocked within the WTO, some WTO Members like the EU and the U.S. might turn to other forums. As a matter of fact, the EU proposed a plurilateral approach to future negotiations on new trade rules.¹⁹¹

It should be stressed that China also seeks to further its norm entrepreneurship in trade. For instance, China has encouraged the discussions of new agendas for investment facilitation of micro, small, and medium-sized enterprises (MSMEs) and e-commerce. China, as an advocate of multilateral discussion on e-commerce, joins “Friends of E-commerce for Development (FED).”¹⁹² In November 2018, China announced its principled arguments on WTO reform. These principled arguments include that, firstly, the reform should be mandated to fight against unilateralism and protectionism; secondly, the reform should proceed with priorities and take a step-by-step approach; thirdly and most importantly, the reform should not be abused to target China.¹⁹³ Furthermore, in May 2019, China submits to the WTO a comprehensive proposal of WTO regime reform.¹⁹⁴ While calling to maintain of the authority of the WTO, contain the abuse of WTO remedies, enhance trade negotiations and to strengthen the S&D provisions, China defends its trade regime, arguing for “the inclusiveness of the multilateral trading system” and thus urging that “[i]t is imperative to respect the diversity of development models among Members.”¹⁹⁵

3.2.2 China and Investment Treaties

Like many other developing countries, China was once hostile to foreign investment. Foreign investment in China was expropriated and nationalized soon after the founding of the PRC in 1949. Since China embarked on the Reforming and Opening-up Policy in 1979, however, China has encouraged the inflow of

never authorize any Member to use its own economic model as the template of ‘market economy,’ and to accuse any other Member who would not copy it as a ‘non-market economy.’” *Id.*

¹⁹¹ EU’s Proposals on WTO Modernization, at 7.

¹⁹² China and the WTO (2018), Part II.1.

¹⁹³ On the reform of the WTO Intervention by H.E. Ambassador Zhang Xiangchen at the Luncheon in Paris Workshop (November 20, 2018), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoints/201811/20181102808197.shtml>.

¹⁹⁴ China’s Proposal on WTO Reform, Communication from China, WT/GC/W/773, 13 May 2019.

¹⁹⁵ *Id.*, at 8.

foreign direct investment (FDI) to satisfy the hunger for capital. From then on, the FDI inflow has increased at a marvelous rate. On the other hand, China has begun to pursue the “Going Abroad” strategy since 1998, the main component of which is to encourage outbound investment.¹⁹⁶ Between 2002 and 2010, the annual growth rate of China’s outward FDI was 49.9 percent.¹⁹⁷ In 2010, China’s outward FDI reached US\$68.8 billion, making it the fifth largest investment source.¹⁹⁸ In 2017, the FDI inflow in China reached US\$135 billion while Chinese outbound FDI amounted to US\$120 billion.¹⁹⁹ China has become one of the largest host states and home states for foreign investment. Therefore, China has huge national interests in the investment treaty regime.

China signed the first bilateral investment treaty (BIT) with Sweden in 1982. According to UNCTAD, as of 2017, China was a contracting party to 127 BITs and to 22 FTAs, including investment chapters. China has become the second largest contracting party to investment treaties, second only to Germany.²⁰⁰ Currently, China is negotiating investment treaties with the largest two economies, the EU and the U.S. China’s government and Chinese investors have begun to be involved in investor-state dispute settlement (ISDS) mechanisms. However, China’s engagement with the International Centre for Settlement of Investment Disputes (ICSID) mechanism is at a nascent stage so far: China’s government has appeared as a respondent state in only three cases, and Chinese investors have also rarely used the ICSID mechanism.²⁰¹ This relative inexperience notwithstanding, since most of the investment treaties China concluded since the late 1990s accord investors with a high standard of investment treatment and protection, and since China has become a leading host state and home state of foreign investment, it is expected that China’s government and Chinese investors will become major clients of the ISDS mechanism in the coming years.

An exhaustive survey on the provisions of Chinese investment treaties is neither necessary nor possible here.²⁰² However, I would like to present several observations in the context of the rise of China. Before 1998, China was

¹⁹⁶ On the evolution of international investment policy of China, see Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Politics and Practice* (Oxford: Oxford University Press, 2009) 1–13.

¹⁹⁷ MOC, 2010 Statistics Bulletin of China’s Outward Foreign Direct Investment, September 16, 2011, at 5.

¹⁹⁸ *Id.*, at 4, 5; UNCTAD, 2011 World Investment Report, at 9.

¹⁹⁹ “China Focus: China 2017 FDI rises to record high, ODI falls” (January 16, 2018), available at http://www.xinhuanet.com/english/2018-01/16/c_136900334.htm.

²⁰⁰ “IIAs by Economies,” available at <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu> (last visited May 18, 2018).

²⁰¹ “Cases,” available at <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> (last visited May 15, 2019).

²⁰² See generally Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Politics and Practice* (Oxford: Oxford University Press, 2009).

reluctant to make substantial commitments in investment treaties.²⁰³ For instance, many Chinese investment treaties either do not accord national treatment (NT) or specify that the NT should be “subject to its law.” Furthermore, nearly all Chinese investment treaties provide that only disputes concerning the compensation amount arising from expropriation could be submitted to international arbitration without consent in advance from the host state.²⁰⁴ Major reasons for that conservative approach include: (1) the rule of law in China was poor and as a result, China could not afford commitments to a high standard of investment treatment and protection; and (2) China was primarily a capital importing state with negligible outward FDI, which meant China had little interest in the protection of Chinese outward FDI. However, China’s approach to investment treaties has become more liberal since the late 1990s.²⁰⁵ For instance, many Chinese investment treaties provide preestablishment NT without the limitation of being “subject to its law”; all legal disputes arising from investment are permitted to be submitted to international arbitration without China’s consent in advance. I suggested elsewhere that Chinese investment treaties have largely been “Americanized.”²⁰⁶ The new approach is attributed to two major factors. Firstly, as the rule of law has gradually improved, China can afford to make more commitments to foreign investment. Secondly, as Chinese outward FDI has rapidly increased, and investment barriers and political risks have emerged as major concerns for Chinese overseas investors,²⁰⁷ seeking better treatment and protection for its overseas investors by modernizing investment treaties has become an important policy agenda for China. Since 2006 or so, however, China has begun to adjust its investment treaty policy again. China now seeks to pursue a new paradigm of investment treaties which strikes a better balance between the private rights of foreign investors and the public authority of host state. For instance, some preliminary procedures are established with the aim to discourage investors from the abuse of procedural rights.²⁰⁸ These adjustments are in concert with the trend of reforming the investment treaty regime which has been underway.²⁰⁹

²⁰³ Cai Congyan, Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice, 7 *J. World Investment & Trade* 621 (2007) 641–648. (hereinafter “Cai Congyan (2006)”).

²⁰⁴ See Stephan W. Schill, Tearing Down the Great Wall: The New Generation Investment Treaties of the People’s Republic of China, 15 *Cardozo J. Int’l & Comp. L.* 73 (2007) 90–91, 94; Cai Congyan (2006), at 641, 638.

²⁰⁵ Cai Congyan (2006), at 641–648.

²⁰⁶ Congyan Cai, China-US BIT Negotiations and the Future of Investment Treaty Regime—A Grand Bilateral Bargain with Multilateral Implications, 12 *J. Int’l Econ. L.* 457 (2009) 460.

²⁰⁷ See Note of the 4th China-US Strategy and Economic Dialogue (SED), June 27, 2008; MIGA, 2009 World Investment and Political Risks, World Bank, 2010, at 84.

²⁰⁸ See, e.g., China–New Zealand FTA (2008), art. 154.

²⁰⁹ See generally Kaul P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Helsinki: Ministry for Foreign Affairs of Finland, 2013).

In light of the research mandate of this book, two issues are worth special mention. Firstly, will China, as a new leading capital exporting state, show more respect for the maintenance of public authority of host states than developed countries did before? This is a major concern for most developing countries. Secondly, will China achieve its norm entrepreneurship in the ongoing reforming of investment treaty regime?

According to Uché U. Ewelukwa who scrutinized many China-Africa BITs concluded in the 2010s, there is “little difference between China-African BITs and BITs between Africa and other Western countries.”²¹⁰ This implies that, like fully developed countries, China also places priority on the rights and interests of Chinese investors instead of on the public authority of African host states. This observation, however, is not totally true. Compared with the U.S., which always refuses any substantial compromises,²¹¹ China agrees that investment treaties “should strike a balance between the protection of investors and the Government’s sovereign right to regulate in the public interest.”²¹² China also supports the idea that investment treaties “should encourage foreign investors to support national development strategies, inter alia through responsible business practices and offer greater attention to investment promotion and facilitation.”²¹³ In practice, China has often made compromises in investment treaties concluded with other developing countries. For instance, the Framework Agreement on Comprehensive Economic Cooperation between ASEAN (2002) includes a provision regarding S&D treatment,²¹⁴ which is rarely found in ordinary investment treaties. Generally speaking, China has great respect for the regulation of host states on investment admission, but tends to seek high standards of investment protection. For instance, the China-Tanzania BIT (2013) includes the limitation of being “subject to national laws” on the NT;²¹⁵

²¹⁰ Uché U. Ewelukwa, *South-South Trade and Investment: The Good, The Bad and the Ugly*, 20 *Minn. J. Int’l L.* 513 (2011) 558. See also Uché U. Ewelukwa, *Africa-China Bilateral Investment Treaties: A Critique*, 35 *Mich. J. Int’l L.* 131 (2013) 177.

²¹¹ Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford: Oxford University Press, 2009) 32, 41.

²¹² BRICS Perspective on International Investment Agreements, the 4th Meeting of the BRICS Trade Ministers: Joint Communiqué, Fortaleza, Brazil (July 14, 2014), available at <http://brics.itamaraty.gov.br/press-releases/2-sem-categoria/227-brics-perspective-on-international-investment-agreements>.

²¹³ *Id.*

²¹⁴ Article 8 provides that “3. For trade in services and investments, the negotiations on the respective agreements shall commence in 2003 and be concluded as expeditiously as possible for implementation in accordance with the timeframes to be mutually agreed: (a) taking into account the sensitive sectors of the Parties; and (b) with special and differential treatment and flexibility for the newer ASEAN Member States” (emphasis added).

²¹⁵ China-Tanzania BIT (2013), art. 3. See also China-Uzbekistan BIT (2011), art. 3; China-Malta BIT (2009), art. 3(2).

however, foreign investors have the right to submit to international arbitration any legal disputes in connection with their investment.²¹⁶

As suggested previously, the investment treaty regime currently is in the process of unprecedented reform. Some new initiatives have been proposed. For instance, Brazil currently advocates an approach of investment facilitation which is distinct from the traditional approach of investment treatment and protection.²¹⁷ Some substantive provisions (for instance, fair and equitable treatment and indirect expropriation) are being clarified,²¹⁸ and some new substantive provisions (for instance, obligations for investors and noneconomic concerns) are being added.²¹⁹ Procedural provisions are also being substantially improved. For instance, some investment treaties now include the requirement of legal capability and a code of conduct for international arbitrators.²²⁰ Some investment treaties include a filter mechanism to prevent the ISDS mechanism from being misused or abused.²²¹ Some mechanisms (for instance, appeal mechanism, third-party funding²²²) are now incorporated to ensure judicial propriety.

China has accepted some of the reformative measures mentioned previously.²²³ However, none of these new investment rules have been proposed by China. It thus can be argued that China is still a rule-taker in international law-making for investment and has not yet made important progress in the norm entrepreneurship in international investment law. In particular, the China-Canada BIT (2012) and the China-Mexico BIT (2008) were “clearly influenced” by the North American Free Trade Agreement (NAFTA) Chapter Eleven (investment) and the 2003 Canada Model BIT.²²⁴

Nevertheless, China is seeking to improve its norm entrepreneurship in the investment treaty regime. As indicated previously, China initiated the Friends of Investment Facilitation for Development (FIFD) within the WTO and sponsored the Joint Ministerial Statement on Investment Facilitation for Development, which was signed by over seventy members in 2017.²²⁵

²¹⁶ China-Tanzania BIT (2013), art. 13. *See also* China-Uzbekistan BIT (2011), art. 12; China-Malta BIT (2009), art. 9.

²¹⁷ *See, e.g.*, 2013 Brazil Model of Cooperation and Facilitation Investment Agreement, arts. 25, 18.

²¹⁸ *See, e.g.*, 2004 U.S. Model BIT, arts. 5, 9 and Annex A and B; 2013 Brazil Model of Cooperation and Facilitation Investment Agreement, art. 16.

²¹⁹ *See, e.g.*, 2015 India Model BIT, arts. 8–12,

²²⁰ *See, e.g.*, CETA, arts. 10.25.5 and 6.

²²¹ *See, e.g.*, CETA, arts. 10.29 and 30.

²²² *See, e.g.*, EU-Vietnam FTA, Chapter Investment, arts. 19, 11.

²²³ *See, e.g.*, China-New Zealand FTA (2008), art. 143 and Annex 13; China-Canada BIT (2012), art. 4 and Annex B.10.

²²⁴ Norah Gallagher, China's BIT's and Arbitration Practice: Progress and Problems, in Wenhua Shan ed., *China and International Investment Law* (Leiden: Brill/Nijhoff, 2015) 203.

²²⁵ Joint Ministerial Statement on Investment Facilitation for Development, WT/MIN (17)/59, December 13, 2017. The Statement calls for structured discussions “with the aim of developing a

Furthermore, China played a leading role in approving the nonbinding Guiding Principles for Global Investment Policymaking during the G-20 Summit in 2016 in China.²²⁶ According to President Xi Jinping, the Guiding Principles initiative represents an important achievement in improving China's capability to participate into global governance.²²⁷ Sauvant also suggests that the Guiding Principles provide China "an opportunity to lay the groundwork for a process that could eventually lead to a multilateral framework on investment, perhaps with an open plurilateral agreement as a first step."²²⁸ It should be noted both the Joint Ministerial Statement and the Guiding Principles merely include principled arguments. Whether China can play an important role in negotiating new "rules" on foreign investment remains to be seen.

3.3 China and the Human Rights Regime

Over the past three decades, perhaps nothing like human rights has regularly ignited tensions and confrontations between China and the Western world, especially the U.S. and the EU. Some Western countries, out of moral, legal, political, or economic consideration, often accuse China of gravely violating human rights and argue that China delays the ratification of several critical human rights treaties, especially the ICCPR; that China fails to comply with human rights treaties that it has approved; and that, more generally, China insists on cultural relativism (or "Asian values") instead of universality.²²⁹ For

multilateral framework on investment facilitation. These discussions shall seek to identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention." However, these discussions shall not address market access, investment protection, and Investor-State Dispute Settlement.

²²⁶ G20 Leaders' Communiqué Hangzhou Summit, 4–5 September 2016, Guiding Principles for Global Investment Policymaking. According to the Guiding Principles, investment policy should be open, nondiscriminatory, transparent, and predictable; dispute settlement procedures should be fair, open, and transparent and prevent from being abused; investment regulation should be participatory for all stakeholders; investment policy and other policies should be coherent; right to regulate investment should be respected; investment promotion should be more effective; and investment policies should facilitate the observation by investors of international best practices and applicable instruments of responsible business conduct and corporate governance.

²²⁷ Xi Jinping, *The Governance of China* (Beijing: Foreign Language Press Co. Ltd, 2017) 448 (in Chinese).

²²⁸ Karl P. Sauvant, China Moves the G20 toward an International Investment Framework and Investment Facilitation, in Julien Chaisse ed., *China's Three-Prong Investment Strategy: Bilateral, Regional, and Global Tracks* (London: Oxford University Press, 2018).

²²⁹ See generally Ann Kent, *China, the United Nations, and Human Rights* (Philadelphia: University of Pennsylvania Press, 1999); Rosemary Foot, *Rights Beyond Borders: The Global Community and the*

the part of China, China has always replied that, although human rights are universal, China has its own cultural, historical, political, economic, and social particularities which justify China's own approach to human rights;²³⁰ that, although more efforts are needed, China has made great progress in improving its human rights record.²³¹ International lawyers have long debated issues such as Chinese human rights thought and history,²³² China's human rights policy and diplomacy,²³³ China's engagement with human rights bodies,²³⁴ and China's compliance with and enforcement of human rights treaties.²³⁵

Today, China's engagement with the international human right regime occurs in two contexts of "human rightization" or humanization of international law and the rise of China. Since the 1990s, human rights have permeated nearly all

Struggle over Human Rights in China (Oxford: Oxford University Press, 2000); Ming Wan, *Human Rights and Chinese Foreign Relations* (Philadelphia: University of Pennsylvania Press, 2001)

²³⁰ Liu Huaqiu, then the Chinese Delegation Head to the 1993 World Conference on Human Rights, asserted:

The concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country. Different historical development states have different human rights requirements . . . Thus, one should not and cannot think the human rights standard and model of certain countries as only proper ones and demand all other countries to comply with them . . ." *Citing from* Michael C. Davis ed., *Human Rights and Chinese Value* (Oxford: Oxford University Press, 1995) 13. *See also* the State Council Information Office of China, *Human Rights Situation in China* (November 1999), Preamble.

²³¹ *See, e.g.*, the State Council Information Office of China, *Human Rights in China* (November 1991); National Human Rights Action Plan of China (2016–2020) (August 2016); National Human Rights Action Plan of China (2009–2010) (April 13, 2009); Progress in China's Human Rights in 2014 (June 2015). *See also* Committee on Economic, Social and Cultural Rights, Concluding Observations on the Second Periodic Report of China, including Hong Kong, and Macao, China, Ec.12/CHN/CO/2, June 13, 2004; National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/17/CHN/1, August 5, 2013.

²³² *See, e.g.*, Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898–1949* (Lund: Department of East Asian Language Lund University, 1996); Robert Weatherley, *Discourse of Human Rights in China: Historic & Ideologic* (New York: Palgrave, 1999); Stephen C. Angle, *Human Rights and Chinese Thought: A Cultural Inquiry* (Cambridge: Cambridge University Press, 2002).

²³³ *See, e.g.*, Ann Kent (1999).

²³⁴ *See, e.g.*, Sonya Sceats and Shaun Breslin, *China and the International Human Rights System* (London: Chatham House, 2012); Ann Kent, *China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994*, 17 *Hum. Rts. Q.* 1 (1995); Ann Kent, *States Monitoring States: The United States, Australia, and China's Human Rights, 1990–2001*, 23 *Hum. Rts. Q.* 583 (2001); Sophia Woodman, *Human Rights as "Foreign Affairs": China's Reporting Under Human Rights Treaties*, 35 *Hong Kong L.J.* 179 (2005).

²³⁵ *See, e.g.*, Björn Ahl, *Exploring Ways of Implementing International Human Rights Treaties in China*, 28 *Neth. Q. Hum. Rts.* 361 (2010); Sanzhuan Guo, *Implements of Human Rights Treaties by Chinese Courts: Problems and Prospect*, 8 *Chinese J. Int'l L.* 161 (2009); Leila Choukroune, *Justiciability of Economic, Social and Cultural Right: The UN Committee on Economic, Social and Cultural Rights Review of China's First Periodical Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 19 *Colum. J. Asian L.* 30 (2005).

fields of international law and indeed have become the cornerstone of international law.²³⁶ Human rights arguably represent a new civilization, even though many controversies surrounding their definition or application remain unsettled.²³⁷ To this important but unsettled legal regime, a rising China is expected to bring about significant change, both for human rights in China and, more generally, for the whole international human rights regime. Currently, many international lawyers, especially those with a Western background, are inclined to assume that China may pose challenges for the Western world-led human rights regimes.²³⁸ They assume that a more powerful China will no longer yield to external pressures on its human rights situation; more importantly, they believe that the international human rights regime might be in peril due to the rise of China. For instance, those countries with poor human right records may, economically at least, embrace China rather than Western states that try to convince these countries, at least rhetorically, to improve their human rights records by employing economic leverages (for instance, investment, lending).²³⁹ David Kampf warned that, if people say that American exceptionalism has damaged international human rights, China “threaten[s] more of the same.”²⁴⁰ Baxter asserted with some hyperbole that the rise of China would lead to “the fall of human rights.”²⁴¹

In light of these backgrounds, I would not like to debate those issues that have attracted much attention of international lawyers. Rather, I would like to focus on another two issues: firstly, how does the human rights regime matter to the rise of China? Secondly and more importantly, can China bring some “good” inputs to the human rights regime?

²³⁶ See generally Louis Henin, *International Law: Politics, Values and Functions*, *Recueil des Cours*, 1989, IV; Bruno Simma, *International Human Rights and General International Law (Collected Course of Academy of European Law, Vol. IV-2, 1993)* (London: Kluwer Law International Law, 1995); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *Recueil des Cours*, 1999, vol. 281; Theodor Meron, *Humanization of International Law* (Leiden: Martinus Nijhoff Publishers, 2006); Menno T. Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009); Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017) 413–414. See also Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14–25 June 1993, A/CONF.157/23, July 12, 1993.

²³⁷ Jack Donnelly, Human Rights: A New Standard of Civilization?, 74 *Int'l Aff.* 1 (1998).

²³⁸ Björn Ahl, The Rise of China and International Human Rights Law, 37 *Hum. Rts. Q.* 637 (2015) 659–661; Katrin Kinzelbach, Will China's Rise Lead to a New Norm Order? An Analysis of China's Statement on Human Rights at the United Nations (2000–2010), 30 *Neth. Q. Hum. Rts.* 299 (2012) 329–332.

²³⁹ See Juan Vega, China's Economic and Political Clout Grows in Latin America at the Expense of U.S. Interests, 14 *Minn. J. Global Trade* 377 (2005) 393; David Kampf, China's Rise and the Implications for International Human Rights, 1 *China Rts. Forum* 43 (2007) 46; Joseph M. Isanga and the United States, The European Union, and China: The Triadic Contest for Africa and Its Implications for International Human Rights and Democracy, 3 *Nw. Interdisc. L. Rev.* 175 (2010) 191–198.

²⁴⁰ David Kampf, *id.*, at 43.

²⁴¹ Ben Baxter, The Rise of China and the Fall of Human Rights, *The Perspectivist*, April 12, 2012.

As far as the implication of the promotion and protection of human rights on the rise China, I argue that engagement with international human rights regime is highly relevant to the legitimacy and efficiency for the rise of China. On the one hand, as suggested previously, human rights have taken a prominent role in international relations. This implies that the respect for human rights is a major source of legitimacy for a state. As a matter of fact, China had begun to sign human rights treaties since China embarked on the Reforming and Opening-up Policy in the late 1970s, including the Convention on the Elimination of All Forms of Discrimination against Women (both signed and ratified in 1980), the International Convention on the Elimination of All Forms of Racial Discrimination (both signed and ratified in 1983), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed in 1986 and ratified in 1988). The signing of these human rights treaties before the 1990s, together with many other treaties, majorly represents a means and a gesture of China to re-engage international society.

However, engagement with international human rights arguably had its biggest impact on the legitimacy of China in international society since the 1990s. It was widely believed that the Tiananmen Square incident in 1989 made the human rights situation in China an international concern.²⁴² Some Western states and international organizations accused China's government of conducting a grave and massive violation of human rights and thus imposed a range of political, economic, and military sanctions.²⁴³ As a response, China sped up its engagement with the international human right regime. In 1991, China published its first white paper on human rights, introducing and defending its conception, policy, and practice on human rights.²⁴⁴ China's government, in that white paper, acknowledged that "the full enjoyment of human rights is the dream that humankind always pursues" and "human rights have become one of major issues which have attracted common concerns in international society."²⁴⁵ In order to convince international society that China will respect human rights, China signed the two most important human rights treaties—the CESCPR and the ICCPR—in 1997 and 1998, respectively. To date, China is a party to twenty-six human rights treaties, including six core human rights treaties.²⁴⁶

²⁴² Thomas W. Huang, Tiananmen Incident, 34 *Boston Bar. J.* 14 (1990).

²⁴³ John W. Garver, *China's Quest* (Oxford: Oxford University Press, 2016) 486–487; Robert Kleinberg, China's Foreign Economic Relations after Tiananmen, 8 *UCLA Pac. Basin L.J.* 303 (1990).

²⁴⁴ The State Council Information Office of China, Human Rights in China, November 1, 1991.

²⁴⁵ *Id.*, Preamble.

²⁴⁶ National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/17/CHN/1, August 5, 2013, at 3 and Annex 3.

This does not mean, however, that China fully embraces the Western world-led human rights regime. For instance, it was not until 2004 that the term “human rights” for the first time was included in China’s constitution.²⁴⁷ Currently, China still argues for its own conception of human rights with “Chinese characteristics.” In the White Paper on Fifty Years of Human Rights Development in China (2000), China’s government gave a detailed explanation of its conception of human rights, which is worth a long quotation:

Since China introduced the policy of reform and opening-up, it has found a road for the promotion and development of human rights that suits its reality. China is a developing country in the East with a long history and a huge population, but with a relative shortage of resources and wealth. To promote human rights in such a country, China cannot copy the mode of human rights development of the developed Western countries, nor can it copy the methods of other developing countries. China can only start from its own reality and explore a road with its own characteristics. . . . China has, on the basis of summing up its historical experiences and drawing lessons from them, found a road to building socialism with Chinese characteristics, and therefore has found a road to promoting and developing human rights which is in line with the country’s reality. This means putting the rights to subsistence and development in the first place, under the conditions of reform, development and stability, and thus promoting human rights development in an overall way. The characteristics of this road are, in terms of the basic orientation of developing human rights, that we stick to the principle of developing the productive forces and promoting common prosperity, based on the improvement of the living standards of the entire people and promoting the human rights of the entire people; in terms of the order of priority, the top priority is given to the rights to subsistence and development, while taking into consideration the people’s political, economic, social and cultural rights and the overall development of individual and collective rights; in terms of the methods of promoting and guaranteeing human rights, we stress that stability is the prerequisite, development is the key, reform is the motive power, and government according to law is the guarantee. . . . Practice has proved that building socialism with Chinese characteristics is a road of development that is in accordance with the fundamental interests of the Chinese people, and also the only road which can effectively promote human rights in China.²⁴⁸

²⁴⁷ China’s Constitution (1982, as amended in 2004), art. 33(2).

²⁴⁸ The State Council Information Office of China, *Fifty Years of Professor of China’s Human Rights* (February 2, 2000), Part VI, available at <http://www.scio.gov.cn/zfbps/ndhf/2000/Document/307946/307946.htm>.

On the other hand, it is obvious that China has always sought to reduce the negative effects of engagement with the international human rights regime on the efficiency of China's rise, which assumes China will maintain an authoritative government and place the priority on economic growth rather than political freedom and social justice. As a result, China has made reservations regarding some provisions which impose demanding obligations on China,²⁴⁹ and rejected all optional protocols which would subject China to compulsory jurisdictions of human rights bodies. China also postpones the ratification of several human rights treaties. For instance, twenty years after its signature of the agreement in 1998, China still has no schedule to ratify the ICCPR, merely reiterating that it continually makes efforts to prepare for ratification.²⁵⁰ Moreover, China fully takes advantage of discretion or loopholes in human rights treaties. For instance, China has adopted an approach of transformation instead of incorporation to implement human rights treaties, which prevents Chinese courts from invoking human rights treaties to challenge executive organs that are major human rights abusers.²⁵¹

Notwithstanding this, it can be expected that human rights in China will be better protected and promoted as China rises. This is because the rise of China will steadily enhance the capability building, which, as noted previously, is an important variable in determining the compliance of a state with international law.²⁵² This is also because the better promotion and protection of human rights in China can enhance the legitimacy of the rise of China. As a matter of fact, in recent years China has taken many important measures for the protection and promotion of human rights.²⁵³

As far as the implication of the rise of China for the international human rights regime, the argument of some Western commentators that a rising China

²⁴⁹ For stance, China declared reservations regarding Article 29 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 20 and Article 30(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 8(1) of the CESC.

²⁵⁰ National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/17/CHN/1, November 10, 2008, at 7; National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: China, A/HRC/WG.6/17/CHN/1, August 5, 2013, at 3.

²⁵¹ See Chapter Six, Section 5.2.

²⁵² See Chapter Four, Section 2.1.2.

²⁵³ See, e.g., The State Council Information Office of China, New Progress in the Legal Protection of Human Rights in China (December 2017), available at <http://www.scio.gov.cn/zfbps/ndhf/36088/Document/1613605/1613605.htm>; New Progress in the Judicial Protection of Human Rights in China (September 2016), available at <http://www.scio.gov.cn/zfbps/ndhf/34120/Document/1490969/1490969.htm>; The Supreme People's Court (SPC) of China, Judicial Transparency by People's Courts (March 2017), available at http://english.court.gov.cn/2017-03/14/content_28552039.htm.

will bring about a detrimental effect on the international human rights regime is not totally unsound. As a matter of fact, China has often employed its economic strength as effective leverage against human rights pressure from some Western countries.²⁵⁴ However, I argue that China's experience in human rights can provide some helpful reflective thinking on human rights for other countries, even though the human rights situation in China is far from perfect. In this respect, I argue that China can bring about some "good" inputs to the international human rights regime.

Presumably, a major "good" input is that China reshapes the Western tradition of a "rights-centric" conception of human rights. Clearly, the Western conception of human rights focuses on the dimension of the rights of individuals while it largely ignores the dimension of obligations.²⁵⁵ By contrast, China always advocates that these two dimensions must be considered simultaneously. According to China, human rights are a "unity of individual rights and collective rights."²⁵⁶ Thus, a person, in enjoying their human rights, should also be attentive to their community obligations. Such a dimension of community obligation is rooted in both socialist conception of law and Chinese traditional culture.²⁵⁷ As a matter of fact, many non-Western countries, including China, and many Western intellectuals have long contended that the Western approach of rights centralism to human rights is flawed.²⁵⁸ It seems that many people tend to recognize the value of collective rights.²⁵⁹ It should be noted that the dimension of community obligation has been confirmed in the Universal Declaration on Human Rights (UDHR), which provides that "everyone has duties to the community in which alone the free and full development of his personality is possible,"²⁶⁰ and the Declaration on the Right to Development, which states that "[a]ll human beings have a *responsibility* for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as *their duties to the community* . . ." (emphasis added).²⁶¹ As China rises as a great power, it might be expected to prompt a more balanced conception of human rights.

²⁵⁴ See Rosemary Foot, at 159–165.

²⁵⁵ Onuma Yasuaki, at 420. See also C. Fred Alford, *Narrative, Nature, and the Natural Law: From Aquinas to International Human Rights* (New York: Palgrave, 2010) 2.

²⁵⁶ See, e.g., The State Council Information Office of China, *The Right to Development: China's Philosophy, Practice and Contribution* (December 2016), Part I, available at <http://www.scio.gov.cn/zfbps/ndhf/34120/Document/1534705/1534705.htm>.

²⁵⁷ See in detail in Chapter 4, Section 3.3.1.

²⁵⁸ Onuma Yasuaki, at 420–421.

²⁵⁹ See generally Miodrag A. Jovanovic, *Collective Rights: A Legal Theory* (Cambridge: Cambridge University Press, 2012).

²⁶⁰ Universal Declaration of Human Rights, A/RES/3/217A, December 10, 1948, art. 29(1).

²⁶¹ Declaration on the Right to Development, A/RES/41/128, December 4, 1986, art. 2(2).

Another major “good” input is that China is redefining the priority of the promotion and protection of human rights. In the Western world, the civil and political rights (CPR) is always prioritized over the economic, social, and cultural rights (ESCR). This conception of hierarchy of human rights is deeply rooted in the Western conception of natural law²⁶² and played a prominent role in the UDHR and the whole development of international human rights law. For instance, the UDHR, in Article 1, solemnly declares that “all human beings are born free and equal in dignity and rights.” In contrast, the ESCR is given far less importance in the UDHR. In all thirty articles of the UDHR, only eight articles concern the ESCR.²⁶³ As a matter of fact, some Western countries seemingly don’t think the ESCR belongs to human rights. For instance, while the U.S. ratified the ICCPR, it rejected the ICESCR. Obviously, the Western conception of a hierarchy of human rights is not shared by many other countries, including China. It should be noted, however, that the Vienna Declaration and Programme of Action, which arguably defeated the so-called “Asia Value” advocated by some Asian countries in the Bangkok Declaration,²⁶⁴ reduced the importance of the hierarchy among human rights. The Vienna Declaration states that states should promote and protect “all human rights and fundamental freedoms.”²⁶⁵ It further provides that all human rights “are universal, indivisible and interdependent and interrelated.”²⁶⁶ Thus, it can be inferred from this statement that every human right should be equally important.

As a matter of fact, some Western countries once expressed their respect for non-Western countries’ policy on the priority of the promotion and protection of human rights. For instance, the European Community (EC) took the view that development preconditioned the respect for human rights, rather than vice versa.²⁶⁷ For instance, during the first round of negotiations for the Lomé Convention in 1973, the European Commission stated:

The conclusions [*sic*] with the Community of an agreement on cooperation entails for the Community’s partners no limitation on their sovereignty, either internal or external, nor on their freedom of choice of objectives or means for their development policy.²⁶⁸

²⁶² C. Fred Alford, at 2–3.

²⁶³ UNHR, arts. 22–29.

²⁶⁴ See, e.g., Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 *Buff. J. Int’l L.* 215 (1995); UN General Assembly, Bangkok Declaration, April 7, 1993, A/CONF.157/ASRM/8A/CONF.157/PC/59.

²⁶⁵ UN General Assembly, Vienna Declaration and Programme of Action, July 12, 1993, A/CONF.157/23, para. 5.

²⁶⁶ *Id.*

²⁶⁷ Lorand Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford: Oxford University Press, 2005).

²⁶⁸ Bull EC Supp. 1/73, at 6–7.

However, after the massacre of hundreds of thousands of people in early 1977 in Uganda, the EC began to adopt a new approach that the CPR should take priority over the ESCR, and subsequently human rights conditionality was included in agreements between the EC and many developing countries.²⁶⁹ The new approach was further encouraged by the “third wave” of democratization that has emerged since the 1970s,²⁷⁰ and, more importantly, the rosy assumption of “the end of history” in the wake of the end of Cold War.²⁷¹ However, the experience of African countries over the past two decades shows that “in conditions of extreme poverty, democracy cannot prosper” and that improper economic policy “has undermined the process of democratization and made it much more difficult.”²⁷² Although it is not wise to squarely announce that the CPR-prioritized approach loses its creditability and viability, it is reasonable to suggest a rethinking of the strength and weakness of such an approach. In contrast China, in its promotion and protection of human rights in the past three decades, puts the priority on the ESCR, especially economic development, rather than the CPR.²⁷³ China always considers “economic development as the central task, laying a solid foundation” for the promotion and protection of human rights.²⁷⁴ As of 2015, China has lifted more than 700 million of people out of poverty, making China the first country to complete the UN Millennium Development Goals.²⁷⁵ China’s rapid economic development arguably enhances the promotion and protection of the CPR of Chinese people, albeit being far from perfect. Also, China can make, by providing foreign aid, tariff privileges, and so on, a larger contribution to the promotion and protection of the human rights, especially the ESCR, in many other developing states. Thus, it can be suggested that China’s human rights strategy helps other countries, especially developing countries, reconsider the supremacy of the Western approach of a hierarchy among human rights. In this sense, it can be argued that China brings about a “good” input to international human rights regime.

²⁶⁹ Lorand Bartels, at 8, 12–31.

²⁷⁰ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman and London: University of Oklahoma Press, 1991).

²⁷¹ Francis Fukuyama, *The End Of History and the Last Man* (New York: The Free Press, 1992).

²⁷² Muna Ndulo, The Democratization Process and Structural Adjustment in Africa, 10 *Ind. J. Global Legal Stud.* 315 (2003) 318.

²⁷³ The State Council Information Office of China, Fifty Years of Progress in China’ Human Rights (February 2, 2000), Part VI.

²⁷⁴ The State Council Information Office of China, The Right to Development: China’s Philosophy, Practice and Contribution (December 2016), Part III, available at <http://www.scio.gov.cn/zfbps/ndhf/34120/Document/1534705/1534705.htm>.

²⁷⁵ *Id.*

3.4. China and “New Regimes”: Taking Cybersecurity Governance as an Example

As observed by Friedmann in his masterpiece of *The Changing Structure of International Law*, published in the early 1960s, there emerged many new fields of international law, for instance, international administrative law international labor law, international criminal law, international economic development law, international antitrust law, international tax law, and so on, since the second half of the twentieth century.²⁷⁶ Thus, those countries—including China—that gained their political and economic independence in the wake of World War II have more chances to propose their arguments in international rule-making in those new fields than in those traditional fields such as the law of territory. Obviously, new fields of international law have continued to emerge since then. Among them include the regulation on antiterrorism, anticorruption, climate change, cyberspace, and so on. Clearly, China, as it rises as a great power, has a high expectation that it can exert substantial influence in these new fields.²⁷⁷

Here, cybersecurity governance, which, in addition to human rights, appears as another major source of confrontation between China and Western powers, is discussed as an example to illustrate how China seeks its norm entrepreneurship.

With the herald of the internet in 1969, information and communication technology (ICT) has become a major concern among states since the late 1990s.²⁷⁸ ICT creates a unique cyberspace, largely dismantling natural (for instance, territorial boundaries) or man-made limits (for instance, legal regulation) based upon which individuals have enjoyed rights and states have exercised powers for centuries. ICT has brought about huge benefits for humanity: information access is easier; businesses operate with lower costs and higher efficiency; and so on. On the other hand, the malicious use of ICT by both state actors and nonstate actors are rampant around the world; terrorists take advantage of the internet to incite, plan, and carry out violent activities; economic saboteurs steal intellectual property and business secrets through the internet; states exercise internet surveillance to infringe on the human rights of their nationals and conduct cyber intrusions to attack foreign critical infrastructure. As a result, ICT may place at stake the rule of law at both a domestic level and international level.²⁷⁹ Furthermore, ICT has developed unevenly, and the

²⁷⁶ Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964) Chapter 11.

²⁷⁷ Xi Jinping, *The Governance of China* (Vol. 1), at 248 (in Chinese).

²⁷⁸ Resolution 53/70. Developments in the field of information and telecommunications in the context of international security, A/RES/53/70, January 4, 1999.

²⁷⁹ See generally Resolution 58/32: Developments in the field of information and telecommunications in the context of international security, A/RES/58/32, December 18, 2003.

“digital gap” continually widens among countries. The basic internet resources have not been well managed in the interests of a majority of countries.²⁸⁰

Although it is still an emerging cyber power,²⁸¹ China is encountering grave challenges and threats in the cyberspace in terms of politics, economy, culture, society, national defense, and individual rights. Thus, President Xi Jinping has warned that, without cybersecurity, there is no national security.²⁸² However, some countries, especially the U.S., blame China for escalating the violations of human rights at home by imposing excessive internet surveillance while instigating and conducting cyber intrusions into foreign targets to illegally acquire business information and governmental information.²⁸³ Actually, cybersecurity has been established as a priority in mutual relations between China and the U.S.²⁸⁴ However, competition and conflicts between China and the U.S. in cybersecurity are expected to continue and even escalate.²⁸⁵

²⁸⁰ MFA and Cyberspace Administration of China, International Strategy of Cooperation on Cyberspace (March 1, 2017), Chapter 1, available at http://www.china.org.cn/chinese/2017-03/07/content_40424606.htm.

²⁸¹ Peter Yu said in 2005 that “the question is no longer how the Internet will affect China. It is how China will affect the Internet.” Citing from Jack Goldsmith and Tim Wu, *Who Controls the Internet?* (New York: Oxford University Press, 2006) 104.

²⁸² See, e.g., Cyberspace Administration of China, National Cyberspace Security Strategy (December 27, 2016), Part I.2, available at <https://chinacopyrightandmedia.wordpress.com/2016/12/27/national-cyberspace-security-strategy/>; The Cyberspace Administration of China Released the Latest Data of Cyberattacks against China from the U.S. (May 20, 2014), available at http://www.cac.gov.cn/2014-05/20/c_126522072.htm; Rogier Creemers, Paul Triolo, and Graham Webster, Translation: Xi Jinping’s April 20 Speech at the National Cybersecurity and Informatization Work Conference (April 30, 2018), available at <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-xi-jinpings-april-20-speech-national-cybersecurity-and-informatization-work-conference/>.

²⁸³ See, e.g., White House Office of Trade and Manufacturing Policy, How China’s Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World, June 2018, 2–4; Cyber Threats from China, Russia and Iran: Protecting American Critical Infrastructure, Hearing before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies of the Committee on Homeland Security House of Representatives, Serial No.113-9, March 20, 2013.

²⁸⁴ For instance, in May 2014, the U.S. filed criminal charges against five Chinese military personnel, which was the first time the U.S. initiated lawsuits against state actors for hacking. See Department of Justice Office of Public Affairs, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), available at <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor>. During President Xi Jinping’s state visit to the U.S. in 2015, China and the U.S. rhetorically agreed that neither country’s government would conduct or knowingly support cyber-enabled theft of intellectual property with the intent of providing competitive advantages to companies or commercial sectors. The two countries further agreed to establish a high-level joint dialogue mechanism on fighting cybercrime and related issues. Both sides are committed to making a common effort to further identify and promote appropriate norms of state behavior in cyberspace within the international community. See Fact Sheet: President Xi Jinping’s State Visit to the United States, The White House Office of the Press Secretary (September 25, 2015), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

²⁸⁵ National Cyber Strategy of the United States of America (September 2018), 2.

According to China, there are no international rules in place that can effectively regulate the behaviors of all cyber actors. Thus, it is necessary to build a “rule-based” order in cyberspace by developing international rules.²⁸⁶ China has also observed that states are currently competing for a leading role in the process of international rule-making for cyberspace and thus sees the importance of making its voice heard in this process.²⁸⁷

China states that it has devoted itself to pursuing “a community of shared future for mankind in cyberspace.”²⁸⁸ To this end, China, in the *International Strategy of Cooperation on Cyberspace* (2017), put forward several principled arguments for international lawmaking on cybersecurity. The first one is the principle of peace. In other words, the purposes and principles enshrined in the UN Charter should be abided by in cyberspace. More specifically, all countries should “oppose ICT-backed acts of hostility and aggression, prevent arms race and conflicts in cyberspace and settle disputes through peaceful means.”²⁸⁹ The second is the principle of sovereignty. China firmly argues that national sovereignty should be respected in cyberspace. China argues that states have the inherent right to choose their own policies of cyber development and governance. As a result, no ICT-backed intervention into internal affairs would be allowed. Nor is the undermining of the security of another country’s ICT supply chain permitted.²⁹⁰ The third principle is the principle of participatory governance. This principle has two elements: multilateral governance and multi-stakeholder governance. Multilateral governance means that all countries, strong or weak, rich or poor, have the right to participate in global governance in cyberspace on an equal footing. Multi-stakeholder governance means that nonstate actors are encouraged to be involved in cyberspace governance. In particular, China stresses that the UN should play a vital role in coordinating international actions.²⁹¹ Finally is the principle of shared benefits. China contends that ICT should benefit all people. It suggests that international society make efforts to narrow the huge “digital gap” between developed countries and developing countries.²⁹² Given that most developing countries lag far behind developed countries in ICT, these sovereignty-oriented principles may be more appealing for developing countries than for the U.S. In the *International Strategy for*

²⁸⁶ *International Strategy of Cooperation on Cyberspace* (2017), Chapters I, III.2, and IV.2.

²⁸⁷ *National Cyberspace Security Strategy* (2016), Part I.2.

²⁸⁸ Remarks by H.E. Xi Jinping President of the People’s Republic of China at the Opening Ceremony of the Second World Internet Conference (December 16, 2015), available at https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1327570.shtml.

²⁸⁹ *International Strategy of Cooperation on Cyberspace* (2017), Chapter II.1.

²⁹⁰ *International Strategy of Cooperation on Cyberspace* (2017), Chapter II.2.

²⁹¹ *International Strategy of Cooperation on Cyberspace* (2017), Chapter II.3.

²⁹² *International Strategy of Cooperation on Cyberspace* (2017), Chapter II.4.

Cyberspace (2011),²⁹³ the U.S., as arguably the most powerful cyber power, set forth three principles of international cooperation in cyberspace: fundamental freedoms, privacy, and the flow of information.²⁹⁴ These principles are certainly important, but they obviously fail to pay due regard to major concerns of developing countries, especially sovereignty in cyberspace and cyber intervention in internal affairs.

China's principled arguments appear to have elicited substantial support. In the debate on how international law applies to cyberspace, the UN Group of Governmental Experts (UNGGE), in its Report (2013), concluded that international law and, "in particular, the UN Charter," should be applicable in cyberspace, which was "essential to maintaining peace and stability and promoting an open, secure, peaceful and accessible ICT environment." The Report (2013) stresses that "state sovereignty . . . [should] apply to State conduct of ICT-related activities and to their jurisdiction over ICT infrastructure within their territory." The Report (2013) also indicates that, given the unique attributes of ICT, "new norms" could be developed.²⁹⁵ Furthermore, the UNGGE, in debating on how international law is applied to the cyberspace in 2015, explicitly referred to the principles of sovereign equality, the settlement of international disputes by peaceful means, and so on.²⁹⁶

It seems that the U.S. has been frustrated in the working of the UNGGE. The U.S. has always affirmed the right of self-defense in cyberspace,²⁹⁷ which implies that the U.S. may use force to respond to cyberattacks. It is, however, reluctant to refer to principles and rules such as sovereign equality, nonintervention into internal affairs, and peaceful settlement of international disputes, which have been embraced in the UNGGE. The UNGGE merely expressed that it "noted" the inherent right that states had to take measures consistent with international law and as recognized in the UN Charter,²⁹⁸ but it did not explicitly refer to the right of self-defense. Furthermore, it suggested that "further study on this matter" would be needed.²⁹⁹ Because of strong opposition from China

²⁹³ White House, International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World, May 2011 (hereinafter "International Strategy for Cyberspace (2011)").

²⁹⁴ *Id.*, at 5.

²⁹⁵ Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (hereinafter "UNGGE Report (2013)"), A/68/98, June 24, 2013, at 8.

²⁹⁶ Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (hereinafter "UNGGE Report (2015)"), A/70/174, July 22, 2015, at 8.

²⁹⁷ See, e.g., International Strategy for Cyberspace (2011), at 10.

²⁹⁸ UNGGE Report (2015), at 12.

²⁹⁹ UNGGE (2015), at 12.

and some other countries, the U.S.'s attempt to reach a consensus within the UNGGE on the right of self-defense in cyberspace failed again in 2017.³⁰⁰

More importantly, China appears to have made some progress in crystallizing rules for cyberspace. For instance, a treaty concerning information security concluded among SCO Members in 2009 identified major threats in the field of international information society.³⁰¹ Furthermore, China, together with other SCO Members, has proposed an International Code of Conduct for Information Security.³⁰² According to the Code of Conduct, for instance, states should not be allowed to damage the supply chain security of ICT by exploiting their dominant position in ICT.³⁰³ It should be noted that the Code of Conduct was one of few that the UNGGE mentioned in its reports.³⁰⁴ This implies that China's legal arguments are likely to be taken seriously in future international lawmaking for cyberspace.

China seeks norm entrepreneurship in cyberspace in three ways. Firstly, China is actively involved in multilateral efforts, for instance, with the UNGGE. In light of two reports submitted by the UNGGE in 2013 and 2015 and the failure of the UNGGE to produce a new report in 2017, it seems that China has exercised substantial influences on debates within the UNGGE. Secondly, like the U.S., which intends to "work with like-minded states to establish an environment of expectations, or norms of behavior, that ground foreign and defense policies and guide international partnerships,"³⁰⁵ China also seeks a coalition of the willing. As indicated previously, China and other SCO Member States have co-sponsored an international code of conduct and signed a treaty concerning information security. Also, China and Russia issued a Joint

³⁰⁰ See Michele G. Markoff, "Explanation of Position at the Conclusion of the 2016–2017 Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security" (June 23, 2017), at <https://www.state.gov/s/cyberissues/releasesandremarks/272175.htm>; Owen Bowcott, Dispute along cold war lines led to collapse of UN cyberwarfare talks, *The Guardian* (August 23, 2017), available at <https://www.theguardian.com/world/2017/aug/23/un-cyberwarfare-negotiations-collapsed-in-june-it-emerges>.

³⁰¹ Agreement on Cooperation in Ensuring International Information Security between the Member States of the Shanghai Cooperation (June 16, 2009), art. 2 and Annex 2.

³⁰² Letter dated 9 January 2015 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, A69/359, September 14, 2011 (hereinafter "International Code of Conduct for Information Security (2011)"); Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, A69/723, January 13, 2015 (hereinafter "International Code of Conduct for Information Security (2015)").

³⁰³ International Code of Conduct for Information Security (2011), at 4–5; International Code of Conduct for Information Security (2015), at 4–5.

³⁰⁴ See UNGGE Report (2015), at 7; Report (2013), at 8.

³⁰⁵ International Strategy for Cyberspace (2011), at 9.

Statement on Cooperation in Information Space Development in 2016.³⁰⁶ The two countries affirm, among others things, sovereignty in cyberspace and oppose using cyberspace for intervention into internal affairs, the disruption of social order, and the undermining of national governance with cyber means.³⁰⁷ Furthermore, China and other BRICS Members have reached an important consensus on cyberspace governance and have established an expert working group on cyberspace.³⁰⁸ Against the Forum on China-Africa Cooperation, the China-Arab States Cooperation Forum, the Forum of China, the Community of Latin American and Caribbean States, and so on, China also seeks a coalition of the willing in cyberspace with more countries in Africa, the area of the Middle East, and Latin America.³⁰⁹ Thirdly, China enhances national “state practice” in cyberspace. In November 2016, China adopted the Cybersecurity Law, which came into effect on June 1, 2017.³¹⁰ The law has encountered many criticisms from some other countries and many private-sector actors.³¹¹ They complain that many provisions in that law are too ambiguous and broad, making the law susceptible to be misused and abused by Chinese authorities.³¹² They also complain that some obligations, especially the requirement of data localization,³¹³ are highly rigid, and impose undue burdens on business operation.³¹⁴ However, the law is expected to make a difference in China’s norm entrepreneurship in cyberspace. There are three major reasons. Firstly, national legislation of a state constitutes important “state practice” in international law. Thus, the Cybersecurity Law (2016) is helpful to justify and strengthen China’s position in the future international lawmaking for cybersecurity. Secondly, given that most countries have not yet enacted comprehensive cybersecurity laws, China’s Cybersecurity Law may provide comparative law support for those countries, thereby “internationalizing” China’s legal practice on cyberspace. Thirdly,

³⁰⁶ The Joint Statement between the People’s Republic of China and Russian Federation on Cooperation in Information Space Development (September 26, 2016), available at http://www.chinadaily.com.cn/china/2016-06/26/content_25856778.htm.

³⁰⁷ *Id.*

³⁰⁸ BRICS Summit Durban Declaration (March 27, 2013), paras. 34, 50; BRICS Summit Ufa Declaration (July 9, 2015), paras. 33, 34.

³⁰⁹ International Strategy of Cooperation on Cyberspace (2017), Part IV.3.

³¹⁰ See Jyh-An Lee, Hacking into China’s Cybersecurity Law, 53 *Wake Forest L. Rev.* 57 (2018)

³¹¹ *Id.*, at 60–62.

³¹² *Id.*, at 97–98.

³¹³ Article 37 of the Cybersecurity Law provides that “Key information infrastructure operators shall store personal information and important data gathered and produced during operation within the territory of the People’s Republic of China. Where it is really necessary to provide such information and data to overseas parties due to business requirements, a security assessment shall be conducted in accordance with the measures formulated by the national cybersecurity administration authority in concert with the relevant departments under the State Council . . .”

³¹⁴ See, e.g., Liudmyla Balke, China’s New Cybersecurity Law and U.S.-China Cybersecurity Issues, 58 *Santa Clara L. Rev.* 137 (2018) 154–155.

China has the largest population of internet users in the world and a huge scale of internet economy.³¹⁵ This arguably increases Chinese strength in the future international lawmaking for cybersecurity.

4. Concluding Remarks

In this horizontal, sovereignty-based world, states are not only holders of legal rights and bearers of legal obligations arising from the international legal regime, for instance, investment treaties, trade treaties, and human rights treaties; but there is a presumption that states themselves create international legal rights and obligations.

However, not every country can exercise substantial—let alone the same—influence in the creation of international legal regimes, even though it arguably has the equal right to do so. In the history of international law, a handful of great powers, based on their overwhelming power and knowledge, dominated the creation of international legal regimes, while the less powerful countries played a marginal role in this process. This further privileged great powers in the application and interpretation of international legal regimes. Therefore, it is safe to say that great powers make law for less powerful countries and the latter merely act as norm takers. What less powerful countries can do at best is to convince others that they are good law compliers.

Like many other developing countries, China has played a minor role in the creation of international legal regimes. It thus adopts an approach of “selective adaptation” to international legal regimes in order to maximize benefits and minimize costs arising from its engagement with international legal regimes. On the one hand, China rejects some international legal regimes or is reluctant to make substantial commitments to some others. However, as China has recognized, since the late 1970s especially, that its engagement with other countries should be framed by international legal regimes, it has tended to steadily embrace international legal regimes. On the other hand, by employing methodologies like progressive compliance and paper compliance, China seeks to convince others that it is a good citizen in compliance with international law while also reducing the potential costs incurred by full compliance with international law.

As China is rising as a great power, it is expected that China, generally speaking, will continually improve its records of compliance with international

³¹⁵ China Internet Network Information Center, The 42nd China Statistics Report on Internet Development (July 2018), Chapters 2, 4.

law. This is not only because China will have more resources and knowledge available to comply with international law. This is also because China may recognize that better compliance can enhance the legitimacy of its rise in the long run. Furthermore and more importantly, China appears ambitious to seek more norm entrepreneurship in the international legal order. For instance, China has often presented “Chinese wisdom” for global governance as “international public goods,” which it contributes to international society. China’s norm entrepreneurship appears to have alarmed some other countries, especially several other great powers. However, it is doubtful whether China, like the U.S., has an ambition to make laws for other countries. Instead, what China wants to do might be that it no longer satisfies itself as norm taker; rather, it will make laws for itself. In order to achieve its norm entrepreneurship in such a highly legalized international order, China deliberately employs methodologies such as advocating principled argument, seeking legal interpretation, building coalitions of the willing, and developing national legal practice. To date, China has been more forceful in advocating its principled arguments, but it has not made perceivable progress in advocating legal rules.

5

Institutions

1. Introduction

“Institutions” are often debated without being defined at all or merely being defined in a casual way. For instance, “the balance of power, international law, the diplomatic mechanism, the managerial system of the great powers,” which were considered by Hedley Bull as “the institutions of international society,”¹ hardly have intrinsic affinity with each other. By contrast, sociologists generally consider an “institution” as something with “some sort of establishment of relative permanence of a distinctly social sort.”² International lawyers are generally in concert with sociologists. They generally refer to “international institutions” as “international organizations” and organs affiliated to them.³ According to the prevailing thinking, international organizations refer to those that (1) are created between states; (2) are established under international treaties; and (3) have organs with wills distinct from their members. International lawyers recognize, however, that these elements are not always easy to satisfy.⁴ Thus, the lack of one or more of these elements, which is not rare in practice, does not prevent an institution from operating as an international organization. Be that as it may, “some sort of establishment of relative permanence” is significant to the operation of institutions aimed to engage activities that happen daily. Thus, international “organizations” and international “institutions” in this chapter are used interchangeably.

As rightly observed by David Kennedy, the twentieth century is a “move to institutions.”⁵ The trend not only refers to the rapid growth of the number of international organizations but more importantly, the fact that international organizations steadily expand their jurisdiction. As José E. Alvarez suggested,

¹ Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1977) 74.

² Quoted in Robert O. Keohane, *International Institutions: Two Approaches*, in *Institutional Rules: Approaches from International Law and International Relations* (Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lug eds., New York: Oxford University Press, 1996) 191.

³ Jan Klabbers, *An Introduction to International Institutional Law* (New York: Cambridge University Press, 2002); Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Boston/Leiden: Martinus Nijhoff Publishers, 4th ed., 2003).

⁴ José E. Alvarez, *International Organizations as Law-Makers* (Oxford New York: Oxford University Press, 2005) (hereinafter “José E. Alvarez (2005)”) 5–6.

⁵ David Kennedy, *The Move to Institutions*, 8 *Cardozo L. Rev.* 841 (1987) 843.

international organizations have transformed the source, content, lawmaking, and compliance of international law.⁶ Today, international organizations have permeated most aspects of international and even domestic affairs, bringing about immense implications for our life. In the context of increasing institutionalization of international relations, even powerful states like the U.S. have recognized that they cannot fulfill all of their expectations, from physical security to economic welfare, without the assistance of international organizations.⁷ Thus, in addition to the regime examination in the previous chapter, an examination of institutions is helpful to understand how China conducts its international legal policies and practice.

The rise of international organizations or the institutionalization of international relations has its functional justification. International organizations not only help peaceful coexistence but also facilitate cooperation among states. Therefore, they have become the “primary means by which states may proper and achieve social objectives” and the “primary means by which states may reassert or express their sovereignty.”⁸ Schermers and Blokker observed that “[i]n particular since 1945, states have sought to structure their cooperation to a large extent in the form of international organizations.”⁹ However, what international organizations bring about is not always desirable. It has been recognized that international organizations are not always accountable.¹⁰ Alvarez rightly suggested that international organizations brought about both promise and perils.¹¹

Compared with international institutions, the role of domestic institutions in international law has been given far less attention. The U.S. is one of few exceptions, if not the sole one. How the president, Congress, and the courts interact each other in foreign affairs has always been a focus of American international lawyers, which is known as foreign relations law.¹² As a matter of fact, both international institutions and domestic institutions are forums where a state conducts international legal policies and practice. Behaviors of a state in an international institution are constrained by both that international

⁶ José E. Alvarez (2005), at 585–650. See also Joel E. Oestreich, *International Organizations as Self-Directed Actors* (London and New York: Routledge, 2012); Jutta Joachim, Bob Reinalda, and Bertjan Verbeek eds., *International Organizations and Implementation* (London and New York: Routledge, 2008).

⁷ José E. Alvarez (2005), at 616.

⁸ Kal Raustiala, Rethinking the Sovereignty Debate in International Law, 6 *J. Int'l Econ. L.* 841 (2003) 860.

⁹ Henry G. Schermers and Niels M. Blokker, at 6.

¹⁰ See Giorgio Gaja, *First Report on Responsibility of International Organizations*, A/CN.4/532, March 26, 2003.

¹¹ José E. Alvarez (2005), at 588.

¹² See generally Louis Henkin, *Foreign Affairs and the United States Constitution* (Oxford: Clarendon Press, 2nd ed., 1997).

institution itself and other member states. By contrast, they remain largely free at the domestic level. In particular, in accordance with the fundamental principle of international law, how a state organizes national institutions generally belongs to its internal affairs. A full knowledge of Chinese domestic institutions is of particular significance to understand Chinese international legal policies and practice because, as illustrated later in this chapter,¹³ institutions in China are organized with “Chinese Characteristics,” which has important implications on Chinese international legal policies and practice. In addition to the introduction and concluding remarks, this chapter consists of two sections. Section 2 examines the Chinese approach to and engagement with international institutions. It begins with reviewing how great powers engage international institutions. Then, this section finds the typology of the Chinese approach to international institutions: outsider, partner, member, and sponsor. Section 3 analyzes how Chinese institutions devise and implement China’s international legal policies and practice. In light of the unique interaction between different institutions, this section does not purport to analyze each national institution one by one, but rather to examine how different institutions interact each other. In other words, Chinese institutions will be examined through the prism of mechanism. Given the different role of public institutions and private institutions in a state, I first I discuss the public-public mechanism in Chinese international legal policies and practice, by examining how the Chinese legislative branch and executive branch interact with each other in treaty-making on the one hand and how Chinese courts interact vertically and horizontally on the other. As far as public-private mechanism is concerned, I focus on state-owned enterprises (SOEs) that represent a unique public-private mechanism and that arouse growing unease among some countries, exploring how Chinese public and private institutions coordinate to enhance the rise of China and how they are managed by international law.

2. International Institutions

2.1 Great Powers and International Organizations

The sovereign equality principle has been established as one of the fundamental principles of international law. An authoritative explanation of that principle was given in the UN Declaration on Principles of International Law of 1970, which reads: “All States enjoy sovereign equality. They have equal rights and

¹³ See Section 3.

duties and are equal members of the international community, notwithstanding differences of an economic, social, political nature.”¹⁴ China always argues: “All countries, regardless of their size, strength or level of development, are equal members of the international community, and they are entitled to equal participation in international affairs,”¹⁵ or: “Countries, big or small, strong or weak, rich or poor, are all equal members of the international community and entitled to equal-footed participation in international rule-making and law-based exercise of rights.”¹⁶

Most debates of sovereign equality and inequality are conducted in the context of international organizations.¹⁷ Here I would not like to add theoretic debates on issues such as the legitimacy, content, merits, and demerits of sovereign equality.¹⁸ Rather, I focus on how sovereign equality is treated in international organizations which often privilege great powers.

The UN is the first international organization which explicitly enshrines the principle of sovereign equality. Article 2 of the UN Charter provides: “The Organization is based on the principle of the sovereign equality of all its Members.” Thus, for instance, in accordance with Article 9(1) and Article 18(1) of the UN Charter, the UN General Assembly consists of “all” the UN Members and each member shall have “one” vote. Obviously, the principle of sovereign equality appeals to those small, weak states and thus is helpful to increase the attractiveness of international organizations for them.

However, great powers often enjoy privileges, *de jure* or *de facto*, in international organizations, which arguably deviates from the principle of sovereign equality.

The League of Nations (“the League”) was the first international organization which endowed great powers with *de jure* privileges. Article 4(1) of the Covenant of League of Nations (“the Covenant”) provided that the Council would consist of representatives of the “Principal” Allied and Associated

¹⁴ Declaration on Principle of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), October 24, 1970, UN GAOR 25th session, Supp. No. 28, 121, UN Doc. A/8028/(1971).

¹⁵ See, e.g., Xi Jinping, Carry Forward the Five Principles of Peaceful Coexistence To Build a Better World Through Win-Win Cooperation—At Meeting Marking the 60th Anniversary (June 28, 2014), available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/t1170143.shtml.

¹⁶ “MFA of Chia, China’s Position Paper on the 70th Anniversary of the United Nations” (September 21, 2015), available at http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1298420.shtml.

¹⁷ See, e.g., Athena Debbie Efrain, *Sovereign (In)equality in International Organizations* (Leiden and Boston: Martinus Nijhoff Publishers, 2000); Jacob Katz Cogan, Representation and Power in International Organization: The Operational Constitution and Its Critics, 103 *Am. J. Int’l L.* 209 (2009).

¹⁸ See generally Emer de Vattel, *The Law of Nations* (Indianapolis: Liberty Fund, Inc., 2008) 12; P. H. Kooijmans, *The Doctrine of the Legal Equality of States* (Leyden: A.W. Sythoff, 1964) 94–120.

Powers as “permanent” members, together with representatives of four other members of the League. These “Principal” powers were great powers, even though that article did not explicitly refer to the U.S., the U.K., France, Italy, and Japan. Notwithstanding, given that Article 4, Paragraph 2 of the Covenant provided that the permanent and nonpermanent membership of the Council could be expanded and, in particular, otherwise specified, any decisions at meeting of the Council or the Assembly “shall require the agreement of all the Members of the League represented at the meeting,” the legal privileges accorded to great powers in accordance with Article 4(1) were thus diluted. As a successor of the League, the UN continues to provide distinct *de jure* privileges to great powers. Article 23 of the UN Charter explicitly states that China, France, the USSR, the U.K., and the U.S. (“P-5”) shall be permanent members of the UNSC. Importantly, the UN Charter, unlike the Covenant, does not provide that the permanent members of the UNSC could be expanded. Furthermore, Article 27 of the UN Charter accords the P-5 with the “power of veto,” namely, any decisions on nonprocedural matters shall be made with “the concurring votes of the permanent members.” The P-5 thus are regarded as “police states.” In addition to the UN, great powers have legal privileges in some other international organizations. For instance, weighted voting is common in international financial institutions.¹⁹ Article 12 of the IMF Agreement provides that “each member shall have two hundred fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand special drawing rights.”²⁰

De facto privileges refer to those privileges that are not explicitly specified in legal documents of international organizations. Jacob Katz Cogan’s painstaking survey shows that nationals from a handful of Western great powers, especially the U.S. and the U.K., overwhelmingly occupy leadership and senior staff of many international organizations, from the IMF to the World Bank (WB), from the ICJ to the WTO Appellate Body, from the UN Secretariat to UNILC, and so on. For instance, presidents of the WB are always American.²¹ Also, it has been observed that approval from the U.S. is “*de facto* necessary” for all senior appointments of the IMF.²² These *de facto* privileges make many international institutions highly sensitive to the concerns of great powers. For instance, it is suggested that senior managers of both the IMF and the WB “would virtually never present a recommendation which risked US disapproval.”²³

¹⁹ See Athena Debbie Efrain, at 199–200.

²⁰ See also Athena Debbie Efrain, at 198–213; William N. Gianaris, Weighted Voting in the International Monetary Fund and the World Bank, 14 *Fordham Int’l L.J.* 910 (1990–1991).

²¹ Jacob Katz Cogan, at 210, 215, 219 and Appendix: Evidence from Informal Agreement.

²² Rosemary Foot, S. Neil MacFarlane, and Michael Mastanduno eds., *US Hegemony and International Organizations* (Oxford: Oxford University Press, 2003) 109.

²³ Rosemary Foot, S. Neil MacFarlane, and Michael Mastanduno eds., at 107.

It is the combination of sovereign equality among states with privileges of great powers—*de jure* or *de facto*—that makes international organizations highly relevant for great powers to exercise their power and pursue their interests. Arguably, international organization serves as a new instrument for great powers to practice hegemonic international law (HIL),²⁴ which characterizes the history of international law.²⁵ Traditional HIL is characterized by great powers' "unilateral" maneuver of their overwhelming power against weak countries. For instance, Spain (1494–1648), France (1648–1815), and Britain (1815–1919) expanded their colonies by, for instance, waging wars against, and imposing "unequal treaties" on, many weak countries. This modality of naked maneuver of power, however, has lost its legality, legitimacy, and effectiveness in the twentieth century.²⁶ First, legal principles such as self-determination of people, sovereign equality, the prohibition of threat of use of force, and nonintervention with internal affairs have deprived great powers of the legality and legitimacy to maneuver their power as they once did in history. Second, powers in international society tend to disperse rather than concentrate,²⁷ and more power hubs emerge in the twenty-first century.²⁸ As a result, great powers no longer unilaterally exercise their power as efficiently as before.

Nevertheless, great powers do not stop their HIL practice. What has changed is that great powers adjust the means to practice HIL, namely, from unilateral, direct means to collective, indirect means by taking advantage of international organizations which arguably represent some sort of community authority. Great powers can either exercise their power in the name of international organizations or manipulate international organizations to pursue their narrow interests. As a result, in contrast with the resort to unilateral actions, the turn to international organizations may endow HIL with legality, enhance the legitimacy, and increase the efficiency of their actions of great powers. The more prominent roles international organizations play in international relations, the more effectively great powers practice HIL. Alvarez rightly suggested that the hegemonic power may be exercised in a collective manner. He observed that the U.S. has relied on international organizations to "magnify its authority by a judicious combination of voting power and leadership."²⁹

²⁴ As to the HIL, see generally Detlev F. Vagts, *Hegemonic International Law*, 95 *Am. J. Int'l L.* 843 (2001).

²⁵ Willhelm G. Grewe, *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000, Michael Byers trans. & rev.).

²⁶ See in detail Chapter Two, Section 2.

²⁷ B. Cheng and E. D. Brown eds., *Contemporary Problems of International Law* (London: Stevens & Sons Ltd., 1988) 21.

²⁸ William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 *Harv. Int'l L.J.* 1 (2015) 5.

²⁹ José E. Alvarez (2005), at 200; Vatts, at 846. See also José E. Alvarez, *Hegemonic International Law Revisited*, 97 *Am. J. Int'l L.* 873 (2003).

On the other hand, great powers may be constrained by and within international organizations. Firstly, in order to increase cooperation from, and compliance by, less powerful states, great powers often promise “strategic restraint,” namely, to reassure less powerful states that they will not dominate international organizations.³⁰ For instance, sovereign equality is included in nearly all international organizations. Furthermore, great powers may be required to bear more duties or obligations. For instance, the U.S. is obliged to pay the largest contribution of regular budget of the UN.³¹ Secondly, less powerful states, by relying upon international organizations, seek to mobilize their resources, coordinate their actions, and thus maximize their power to engage great powers.³² Those small states thus become “smart states.”³³ Those less powerful states are thus willing to join international organizations. Thus, it comes as no surprise that complaints toward international organizations often do not come from less powerful states, but from great powers. As a result, HIL through international organizations may encounter the constraints which unilateral HIL does not.³⁴ As international power continually disperses among states, great powers may be expected to face more challenges from less powerful states within international organizations. This means that, while enjoying privileges, great powers may also be imposed upon substantial constraints because of their participation in international organizations. Therefore, a great power must decide whether to join or to exit from an international organization based on the calculation of costs and benefits arising from participation in that organization. For instance, since the U.S. complained that American interests were not fairly treated in UNESCO, it withdrew from that organization in 1984³⁵ and in 2017.³⁶ President Trump also roars that the WTO treats the U.S. “very badly.”³⁷

Moreover, a great power might be excluded from an international organization because, for instance, the existing member states may be wary that that great power, if admitted, will achieve a dominant role.

³⁰ G. John Ikenberry, *Institutions, Strategic Restrain, and the Persistence of American Postwar Order*, 23 *Int'l Security* 43 (1998/98) 45.

³¹ See, e.g., Assessment of Member States' advances to the Working Capital Fund for the biennium 2018–2019 and contributions to the United Nations regular budget for 2018, ST/ADM/SER.B/973, December 29, 2017.

³² See generally Erich Reiter and Heinz Gärtner eds., *Small States and Alliances* (Verlag: Springer, 2001); Jacqueline Anne Braveboy-Wagner, *Small States in Global Affairs* (New York: Palgrave, 2008); Andrew F. Cooper and Timothy M. Shaw eds., *The Diplomacies of Small States* (New York: Palgrave, 2009); Robert Steinmetz and Anders Wivel eds., *Small States in Europe* (Farnham: Ashgate, 2010).

³³ Andrew F. Cooper and Timothy M. Shaw eds., 41–64.

³⁴ José E. Alvarez (2005), at 215, 216.

³⁵ “U.S. Is Quitting UNESCO, Affirms Backing for U.N.,” available at <https://www.nytimes.com/1983/12/30/world/us-is-quitting-unesco-affirms-backing-for-un.html> (last visited May 5, 2019).

³⁶ “The United States Withdraws From UNESCO,” available at (last visited May 15, 2019).

³⁷ “Trump: WTO treats the U.S. ‘very badly,’” available at <https://www.cbsnews.com/news/trump-wto-treats-the-u-s-very-badly-what-does-the-wto-do/> (last visited May 15, 2019).

2.2 China and International Institutions

2.2.1 Typology of China's Engagement with International Institutions

In the past several decades China's approach to international institutions has experienced substantial changes. As of the late 1960s, China had hardly joined international institutions. China's engagement with international organizations "not only lagged far behind that of every other major power but also that of most of the other independent nations of the world."³⁸ This situation significantly changed after the PRC began to represent China in the UN in 1971. In 1977, the number of international organizations of which China was a member state was one quarter of that number of the U.S. and 70 percent of the average number of all states. In 1996, this percentage increased to 70 percent and 180 percent of the U.S. and the whole world, respectively. In that year, China was a member state of thirty out of all thirty-seven global intergovernmental organizations, while that number was thirty-three for the U.S.³⁹ Today, China holds membership in nearly all international organizations to which the U.S. is also a member state. As a matter of fact, the participation in international organizations is an important means for China to socialize itself in international society.⁴⁰

According to Ann Kent, China's state identity had substantial influence on its approach to international organizations. In 2002, Kent suggested:

China's complex identity as an incipient great power, a permanent member of the Security Council wielding a veto, a member of the exclusive Permanent Five (P-5) nuclear club, a developing state that is the chief beneficiary of World Bank loans, and a socialist state previously exploited by imperialist powers has given rise to conflicting concerns and idiosyncratic behavior. Its Marxist principles and political culture continue to shape its particular motivations, perceptions, and responses to international organizations. In particular, the doctrine of self-reliance and a fierce defense of sovereignty, if less egregious than in the Maoist years, remain constant influences underlying policy responses. At the same time, its awareness of its economic and strategic potential and its importance as a market for the developed world lead it to behave like a great power, even if it is not yet one.⁴¹

³⁸ Jerome Alan Cohen ed., *China's Practice of International Law: Some Case Studies* (Cambridge: Harvard University Press, 1972) 322.

³⁹ Alastair Iain Johnston, Some Reflections on China's Participation into International System, 7 (1999) *J. World Econ. & Pol.* 4 (1999) 5 (in Chinese).

⁴⁰ See generally Ann Kent, China's International Socialization: The Role of International Organizations, 8 *Global Governance* 343 (2002).

⁴¹ Ann Kent, at 345.

Furthermore, according to Kent, there were both tactics and principles in China's engagement with international organizations. On the one hand, China invokes whichever aspect of its identity that it finds can function best to promote its power. On the other hand, China always pledges respect for principles such as sovereign equality.⁴² Obviously, China's flexibility and principled position can be explained with the theories of identity and the evolution of China's state identity as discussed in Chapter Two.

The engagement with international organizations brings about benefits and costs for China. Kent proposed three indexes to evaluate these implications: redefinition of national interests, renegotiation of sovereignty, and acceptance of costs. According to Kent, the participation in international organizations, including interactions with other members within them, enables China to correctly understand and identify its real national interests, to gradually refine its traditionally rigid conception of sovereignty, and to better balance the benefits and costs arising from participations in international organizations.⁴³

According to Kent, China had an aspiration of conceiving international institutions "as vehicles of global reform."⁴⁴ This might be because China was aware of "its economic and strategic potential and its importance as a market for the developed world," which prompted it to "behave like a great power, even if it is not yet one."⁴⁵ As a matter of fact, as a "revolutionary state," the PRC, since its founding in 1949, had an ambition to create a "new" world. To that end, China proposed many radical initiatives to reform international regimes and institutions to nearly all of which China was an outsider. For instance, in 1974, China accused developed countries of abusing the international trade regime to the detriment of developing states.⁴⁶ Kent observed, however, that China's more recent approach to reform "is exerted more indirectly and discreetly through global institutions."⁴⁷ Obviously, China's more recent engagement with international organizations does not purport to socialize itself international society any longer. Rather, it is aimed to enhance and justify the rise of China.

However, not all engagements with international organizations are meaningful. It is recognized that although China often gives comments on initiatives proposed by other countries, it rarely presents proposals on its own in international organizations, for instance, in the UN General Assembly or the UNSC. China's passiveness in international organizations has surprised many other

⁴² *Id.*, at 346–348.

⁴³ *Id.*, at 350–357.

⁴⁴ *Id.*, at 348.

⁴⁵ *Id.*, at 345.

⁴⁶ See Speech By Chairman of the Delegation of the People's Republic of China, Teng Hsiao-Ping, At the Special Session of the U.N. General Assembly, April 10, 1974.

⁴⁷ Ann Kent, at 348.

countries.⁴⁸ This phenomenon is arguably attributable to China's policy of "keep a low profile [tao guang yang hui],"⁴⁹ the lack of highly qualified diplomats on the other hand,⁵⁰ and so on.

Unfortunately, a systematic framework to explain China's approach to international organizations remains absent. For instance, Kent's description is too general, failing to provide a typology for China's different approaches to international organizations. Furthermore, while a large number of publications extensively discuss why China participates in international organizations, how China behaves in international organizations, and how these participations affect China, they have paid little attention to those international organizations to which China does not hold membership but still can be influenced. Most current literature also fails to treat as a separate issue a significant development, namely, that China has sponsored several international organizations that are highly relevant to the rise of China. It is found that China engages international organizations in four capacities: outsider, partner, member, and sponsor. Under this typology, I examine the engagement of China with some international organizations.

2.2.2 China as an Outsider

Although there is a network of international organizations in international society, it is not uncommon that a state stands outside an international organization or, specially, exits from one in which it has held membership. For instance, in 2016 the U.K. decided to exit from the EU.⁵¹ There are many factors leading to a state standing outside an international organization, for instance, state identity, the functions of the international organization, and the benefits and costs arising from holding membership in an international organization. For instance, the U.K. justifies its exit from the EU presumably because it finds it could not afford the tremendous costs arising from its EU membership,⁵² while the unique state identity of Turkey may be a major reason for prolonged negotiations on that country's accession to the EU.⁵³ Standing outside an international organization means that a state has neither rights nor obligations

⁴⁸ See Alastair Iain Johnston, A Summary on the Studies of American Scholars on the Relationship between China and International Organizations, 8 (2001) *J. World Econ. & Pol.* 48 (2001) 49 (in Chinese).

⁴⁹ See Chapter Two, Section 5.2.1.

⁵⁰ See Chapter Four, Section 2.2.3.

⁵¹ Juha Raition, The UK EU Referendum and the Move towards Brexit, 24 *Maastricht J. Eur. & Comp. L.* 25 (2017); Paul Craig, Brexit: A Drama, Six Acts, 2016 *R.R.D.E* 11 (2016).

⁵² "20 reasons you should vote to leave the European Union," available at <https://www.telegraph.co.uk/news/2016/06/22/20-reasons-you-should-vote-to-leave-the-european-union/> (last visited May 15, 2019).

⁵³ See Burak Akcapar and Denis Chaibi, Turkey's EU Accession: The Long Road from Ankara to Brussels, 1 *Yale J. Int'l Aff.* 50 (2005–2006).

arising from membership. Thus, a state may act more freely. However, it may still face some organized pressure from an international organization.⁵⁴ Importantly, there may be alternatives to compensate for the lack of membership of an international organization. For instance, the U.K. seeks to rebuild the legal framework regulating the relations with the EU by, for instance, negotiating a free trade agreement with the EU, after it leaves the EU.⁵⁵ In other words, a state may conduct international intercourse by relying upon international regimes instead of international organizations.

Like other countries, China stands outside many international organizations. Generally speaking, before China embarked upon the Reforming and Opening-up Policy in the late 1970s, its state identity was highly relevant to China's absence in some international organizations, while functions of international organizations and the calculation of benefits and costs appeared less important; from then on, its state identity gradually reduced its importance while the other two factors gained more significance. Let's take as an example China's policy toward the UN in the 1950s and 1960s. In 1959, in a reply to supports from some Latin American Communist leaders for the PRC to sit in the UN, Mao Zedong argued:

The Western countries consider China an outlaw state. And that is why we can act without regard for law that restrict us. We act in whatever way we please. This is why we are in no hurry to join the UN. We shall not poke our nose into this cesspool.⁵⁶

A similar explanation can be found in a Chinese document from 1961:

If our country joins the United Nations, we cannot have a majority in voting: formally the struggle situation may be moderated to some extent, but actually the struggle that arise will be more violent and we shall lose our present freedom of action. Though standing outside of the United Nations, we could still participate in the Bandung Conference. We made tremendous achievements in that Conference. . . . At the present moment we have established diplomatic relationships with 39 countries, without any possibility of

⁵⁴ For instance, Article 2(6) of the UN Charter provides that the UN "shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

⁵⁵ See, e.g., Nanette Neuwahl, CETA as a Potential Model for (Post-Brexit) UK-EU Relations, 22 *Eur. Foreign Aff. Rev.* 279 (2017); Holger Hestermeyer and Federico Ortino, Towards a UK Trade Policy Post-Brexit: The Beginning of a Complex Journey, 27 *K.L.J.* 452 (2016).

⁵⁶ Citing from Jerome Alan Cohen and Hungdah Chiu eds., *People's China and International Law: A Documentary Study* (Princeton: Princeton University Press, vol. 2, 1974), 1295.

being hindered by the United Nations. Outside of the United Nations, we have enjoyed a peaceful coexistence with the countries in Asia, Africa and Latin America, and the peaceful area is being enlarged.⁵⁷

An exhaustive examination of all international organizations to which China is not a member is not practical in these limited pages. Thus, I just focus on the Group of 7 (G-7) and the International Criminal Court (ICC).

2.2.2.1 *China and the G-7*

The Group of 7 states (G-7) originated from summits held in 1975 and 1976 among several Western industrialized countries including France, the U.S., the U.K., Germany, Japan, Italy, and Canada. Initially, the G-7 aimed to find a new mechanism to coordinate among Western industrialized countries to handle pressing economic challenges, including the collapse of the fixed exchange rate within the Bretton Woods system and the “Oil War” waged by several Middle Eastern oil countries. As Russia was admitted to the G-7 in 1998, the G-7 became the G-8. However, Russia has never played a key role in the G-8, and, importantly, Russia’s membership was suspended as a punishment by the other seven states for Russia’s annexation of Crimea in 2014.⁵⁸

Over the past several decades, the G-7 has significantly expanded its mission from economic issues to political and security issues. For instance, it was not the UN but the G-7 that played a leading role in coordinating Germany and Japan’s financial support of the Gulf War of 1990–1991. Similarly, the G-7 was largely responsible for the decision to wage the U.S.-led war on Iraq in 2003. Therefore, it is said that the G-7 sometimes prevails over the UN in world affairs.⁵⁹

As several developing countries, especially China, have significantly expanded their power while several G-7 countries have seriously suffered from the global financial crisis of 2008, it is suggested that the G-7 needs more cooperation with major developing countries. The issue of whether the G-7 should be expanded thus emerged. China is considered as the most likely potential new member of the G-7. However, three major factors make China unlikely to join the G7 in the foreseeable future. First, the G-7 countries always proclaim themselves as countries with liberal and market economic regimes, but China is perceived as an authoritarian country led by the CCP. Second, China still

⁵⁷ Citing from Jerome Alan Cohen and Hungdah Chiu eds., at 1296.

⁵⁸ See “G8 suspends Russia for annexation of Crimea,” available at <https://www.telegraph.co.uk/news/worldnews/europe/russia/10720297/G8-suspends-Russia-for-annexation-of-Crimea.html> (last visited May 10, 2019).

⁵⁹ Hugo Dobson, *The Group of 7/8* (Florence: Routledge, 2006) 34–35.

perceives itself as a developing country that focuses on policy agendas distinct from those of developed countries. Third, Japan may not support the inclusion of China because a new G-7 country from Asia would decrease Japanese importance within the G-7.⁶⁰ Therefore, although China's leaders were invited to attend dialogues with leaders of G-7 in 2003, 2004, and 2005, China's G-7 membership has not yet become an official agenda item either for the G-7 or for China. As a matter of fact, there have not been similar dialogues since then.

As China rises, G-7 countries may find it necessary to coordinate with each other to engage a rising China. For China, the G-7's maritime security policy has sent a negative signal. As maritime disputes between China and several neighboring countries have been intensifying since the 1990s, which culminated in the SCS arbitration in 2013, the G-7 for the first time included maritime security as a separate agenda item at the summit of 2015. In April 15, 2015, foreign ministers of the G-7 and the representative of the EU issued a declaration on maritime security. In that declaration they declared that they were concerned with the situation in the East China Sea and the SCS and any unilateral actions which changed the status quo and increased tensions, and strongly opposed any attempt to assert territorial or maritime claims through the use of intimidation, coercion, or force. They also called on all states to pursue the peaceful management or settlement of maritime disputes in accordance with international law and to fully implement any decisions rendered by the international tribunal, and stressed the importance of coastal states refraining from unilateral actions that cause permanent physical change to the marine environment in areas pending final delimitation. In particular, they called for "the acceleration of work on a comprehensive Code of Conduct in the South China Sea and, in the interim, emphasize our support for the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea."⁶¹ Later, the G-7's leaders also expressed their concern on tensions in the East and South China Seas. They stated that they were "committed to maintaining a rules-based order in the maritime domain based on the principles of international law, in particular as reflected in the UN Convention on the Law of the Sea."⁶² Again, foreign ministers of the G-7, in a communique issued in April 2018, expressed their concern toward the SCS, especially arguing for "the July 12, 2016, award rendered by the Arbitral Tribunal under the UNCLOS as a useful basis for further efforts to peacefully resolve disputes in the South China Sea."⁶³

⁶⁰ Hugo Dobson, at 58.

⁶¹ G7 Foreign Ministers' Declaration on Maritime Security, Lübeck, April 15, 2016.

⁶² Leaders' Declaration, G7 Summit June 7–8, 2015.

⁶³ G7 Foreign Ministers' Communique, April 23, 2018, para. 9.

Obviously, China is aware of the organized pressure from the G-7. As a response, China called for “the G-7 and other countries beyond the region to properly understand the situation, to keep their promise not to take side on the relevant disputed issue, to fully respect for efforts which countries in the region have taken to manage and control the disputes, to cease to spread irresponsible views and thus to play a constructive role in the regional stability.”⁶⁴ In a nutshell, there should be awareness that the G-7 may be highly relevant to the rise of China.

2.2.2.2 *China and the ICC*

To establish an international criminal court has long been an aspiration of international society. On July 17, 1998, after a half of century of stalemate,⁶⁵ the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (“the UN Diplomatic Conference”) adopted the Rome Statute of the International Criminal Court (“Rome Statute”), which entered into force on July 1, 2002. In February 2003, as the first Assembly of State Parties (ASP) of the Rome Statute elected judges for the first term, the ICC accordingly began to function. The ICC, upon the referrals by either a state party in accordance with the Rome Statute or the UNSC in accordance with Chapter VII of the UN Charter, can exercise the jurisdiction over four kinds of crimes including the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. It can also initiate investigation *proprio motu* on those crimes.⁶⁶ As of December 2018, there are 138 signatories and 123 parties to the Rome Statute. The establishment of the ICC represents a historical achievement in the maintenance of international peace and security and the protection of human rights.

China “consistently understands and supports the establishment of an independent, impartial, effective and universal international criminal Court.”⁶⁷ Therefore, China was active in the negotiations on the Rome Statute. Chinese diplomats served as the vice president of the UN Diplomatic Conference and

⁶⁴ “The MFA’s Spokesman Lu Kang Answers Questions by Correspondents on the Content concerning East China and South China Sea in Joint Communique of G-7,” available at http://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/t1465917.shtml (last visited May 10, 2019).

⁶⁵ As early as the 1940s, the UNGA, in adopting the Convention on the Prevention and Punishment of the Crime of Genocide, invited the ILC “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . .” See General Assembly, Resolution 260 of December 9, 1948.

⁶⁶ Rome Statute, arts. 3, 13, 14, and 15.

⁶⁷ MFA, “China and the International Criminal Court” (October 28, 2003), available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tyfl_665264/2626_665266/2627_665268/t15473.shtml. See also MFA of China, Position Paper of the People’s Republic of China on the United Nations Reforms, June 7, 2005, Part III.2.

as members of Drafting and Credentials Committees.⁶⁸ However, China finally voted against the Rome Statute in light of some deficiencies in the Rome Statute which may hinder the just and effective functioning of the ICC.⁶⁹ These reasons include: (1) China's opposition to allowing the ICC to exercise universal jurisdiction; (2) China having serious reservations over the ICC's jurisdiction over war crimes arising from noninternational armed conflicts; (3) China's opinion that the UNSC would be better positioned to deal with the aggression; and (4) China's serious reservations over the power of the prosecutor to initiate investigation *proprio motu*. Furthermore, China's refusal to sign the Rome Statute is attributable to both its general approach to international law, especially the respect for sovereignty and—more importantly—specific domestic and international concerns.⁷⁰ For instance, China has never promised no use of force against Taiwan.⁷¹ Also, there is risk of armed conflict between China and several neighboring countries because territorial disputes remain unsettled between them.⁷² Notwithstanding, it should be stressed that China does “not exclude the possibility of considering the accession to” the Rome Statute “at an appropriate time.”⁷³

China may benefit much from the full membership of the ICC. For instance, China would have the right to vote for or against any legal initiative in relation to the Rome Statute and the ICC. Also, China would have the right to nominate its citizens to compete for a position of ICC judge. All these can enhance China's role in the development of international criminal law.⁷⁴ However, China appears to have recognized that, even though it stands outside the ICC, it can play a part in the development of international criminal justice because China, according to the Final Act of the Conference, is entitled to participate in the Preparatory Commission for the ICC⁷⁵ and to attend the Assembly of States Parties (ASP) of the Rome Statute⁷⁶ and because China, in accordance with the Rome Statute and the UN Charter,⁷⁷ may exercise substantive influence

⁶⁸ Bing Bing Jia, *China and the International Criminal Court: The Current Situation*, 10 *S.Y.B.I.L.* 87 (2006) 88.

⁶⁹ MFA of China, *Position Paper of the People's Republic of China on the United Nations Reforms*, Part III.2.

⁷⁰ Dan Zhu, *China and the International Criminal Court* (New York: Palgrave, 2018) 270–271.

⁷¹ China's Anti-Session Law (2005), art. 8.

⁷² See, e.g., Wei Yuwa, *China and Its Neighbors: Exasperating Territorial Disputes*, 22 *Willamette J. Int'l L. & Dis. Res.* 105 (2014).

⁷³ MFA, “China and the International Criminal Court” (October 28, 2003), available at http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tyfl_665264/2626_665266/2627_665268/t15473.shtml.

⁷⁴ Dan Zhu, at 275–276.

⁷⁵ Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/10*, July 17, 1998, Resolution F in Annex I.

⁷⁶ For instance, China attended the Kampala Conference of the ASP of the Rome Statute in 2010.

⁷⁷ Rome Statute, art. 13(2); the UN Charter, art. 27.

on the application of the Rome Statute by employing its privileged status as a permanent member of the UN Security Council.⁷⁸ Furthermore, that China stands outside the Rome Statute can effectively hinder the ICC in potentially exercising its jurisdiction against China. This is because state consent under the Rome Statute is the regular legal basis for the ICC to exercise jurisdiction, even though the prosecutor of the ICC has the authority to initiate investigation *proprio motu*.⁷⁹ It should be noted that, in addition to countries like China and the U.S., which did not accept Rome Statute at the outset, some countries, for instance, Russia in 2016 and the Philippines in 2017, have exited from the ICC. Thus, it seems that China is wise to maintain the possibility to sign the Rome Statute in the future while not rushing into membership of the ICC for the time being.

2.2.3. China as a Partner

By partnership I mean that China has an institutional mechanism with an international organization by which close cooperation between China and that international organization has been conducted, even though China has no intention or opportunity to applying for membership. Compared with outsidership, partnership implies that an international organization in question is more significant for China and that induces China to engage with that institution in a more constructive manner.

2.2.3.1 *China and the G-77*

The Group of 77 (G-77) is the largest intergovernmental organization of developing countries, which has 134 member states as of December 2018. On June 15, 1964, seventy-seven developing countries signed the “Joint Declaration of the Seventy-Seven Developing Countries” at the end of the first session of UNCTAD, which marked “the beginning of a new era in the evolution of international co-operation in the field of trade and development.”⁸⁰ The G-77 assumed that the solidarity among developing countries was “indispensable instrument for securing the adoption of new attitudes and new approaches” in the international economic order.⁸¹ Thus, the G-77 serves as a forum for developing countries to “articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic

⁷⁸ For instance, on May 22, 2014, China, together with Russia, vetoed a draft resolution referring the worsening situation in Syria to the ICC for investigation. U.N. SCOR, 69th Sess., 7800th mtg. at 4, U.N. Doc. S/PV.7800 (May 22, 2014).

⁷⁹ Rome Statute, arts. 12, 13, and 15.

⁸⁰ Joint Declaration of the Seventy-Seven Developing Countries, para. 10.

⁸¹ *Id.*, paras. 7, 8.

issues” and to promote “South-South cooperation for development.”⁸² The G-77 has adopted numerous declarations, action programs, and agreements on development issues.⁸³ Developing countries, through the G-77, declare their common position, claims, and aspiration. However, the G-77 has not adopted any decisions legally binding its members.

China was invited to join the G-77 shortly after the PRC had begun to represent China in the UN in 1971. China did not accept that offer, however. According to China’s explanation, it would be more helpful for China to coordinate with developing countries outside rather than inside the G-77.⁸⁴ In practice, China and the G-77 conduct cooperation through the “G-77 and China” mechanism. Through this mechanism, China and the G-77 co-sponsor initiatives or co-announce on a large range of issues. For instance, on the eve of the Fifth WTO Ministerial Conference in 2003, they issued a joint declaration of “A call for a multilateral trading system which is responsive to the needs of developing countries.”⁸⁵ Since 1994, China has begun to annually donate US\$50,000 to the G-77.⁸⁶

As a nonmember state, China cannot participate in the process of decision-making of the G-77, which to a certain degree prevents China from playing a leading role in international relations. Take as an example China’s role in the New International Economic Order (NIEO) movement. The NIEO was initiated by the G-77 first within UNCTAD and then advocated in the UN General Assembly. The G-77 “almost completely dominated” the birth of all major NIEO instruments,⁸⁷ including the Declaration on the Establishment of a New International Economic Order (NIEO Declaration), the Programme of Action on the Establishment of a NIEO (NIEO Programme of Action), and the Charter of Economic Rights and Duties of States (NIEO Charter). For instance, the NIEO Charter was introduced on behalf of ninety-nine countries that all belong to the G-77, excluding China, even though China was a member of the Working Group that was authorized to prepare the draft of the NIEO Charter.⁸⁸

However, it seems that maintaining partnership instead of seeking membership is in the interest of China. First, the G-77 is a loose international organization. Apart from regularly announcing principled policies, the G-77 has

⁸² “About the Group of 77,” available at <http://www.g77.org/doc/> (last visited May 15, 2019).

⁸³ *Id.*

⁸⁴ See Samuel S. Kim, *China, the United Nations, and World Order* (Princeton: Princeton University Press, 1979) 256–257.

⁸⁵ Declaration by the Group of 77 and China on the Fifth WTO Ministerial Conference Cancun, Mexico, September 10–14, 2003.

⁸⁶ “Grout of 77,” available at http://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/gjjjs_674249/gjzzyhygk_674253/qsqg_674549/gk_674551/ (last visited May 15, 2019).

⁸⁷ Samuel S. Kim, at 256.

⁸⁸ *Id.*, at 266, 269.

never adopted any instruments with legally binding force. Thus, the G-77 is not capable of mobilizing meaningful collective actions to achieve its proposed projects. As a result, China could not benefit much from the collective actions of the G-77 if it held G-77 membership. Second, the G-77 is highly critical of the international legal order led by developed countries. However, since the late 1970s, China has purported to expand its power by increasing cooperation with the developed world. Therefore, maintaining partnership instead of seeking membership in the G-77 can endow China with flexibility toward international legal order. Third, China, through the “G-77 and China” mechanism, has succeeded in proclaiming itself as a peer of the G-77 and further attaining understanding and support from the G-77 on a large range of issues. For instance, the G-77 found it “awkward to publicly oppose” China’s application for the resumption of the original contracting party of the GATT.⁸⁹ Overall, China’s pragmatism toward the G-77 is helpful to the rise of China: on the one hand, it helps China maintain the affinity and solidarity with other developing countries; on the other hand, China reduces potential conflicts with developed countries.

It should be noted that, as China rises as a new great power, disagreements between China and the G-77 countries appear to have increased, for instance, with respect to climate change.⁹⁰ Thus, China might find that it can no longer engage the G-77 as comfortably as before. How China maintains its partnership with the G-77 remains to be seen.

2.2.3.2 *China and ASEAN*

The Association of Southeast Asian Nations (ASEAN) was established by the ASEAN Declaration (Bangkok Declaration) signed by Indonesia, Malaysia, the Philippines, Singapore, and Thailand in August 1967. As Brunei Darussalam (1984), Vietnam (1995), Lao and Myanmar (1997), and Cambodia (1999) were successively admitted, ASEAN countries currently have reached to ten.

In the Cold War, the Southeast Asia area was a battleground of confrontations first between the U.S. and the USSR and then between the USSR and China. In the 1950s and 1960s, revolutionary China gave much support to communist groups in Southeast Asian countries with the aim of expanding the soviet camp, which provoked bitterness between China and other Southeast Asian countries.⁹¹ Thus, ASEAN was established with three main aims and purposes: (1) to reduce tensions and competition among themselves; (2) to deal with internal

⁸⁹ Harold K. Jacobson and Michel Oksenberg, at 96.

⁹⁰ Richard Black, “Developing Countries Split over Climate Measures,” available at <http://news.bbc.co.uk/2/hi/science/nature/8403745.stm> (last visited May 10, 2019).

⁹¹ John W. Garver, at 196–231.

communist challenges and/or externally sponsored communist insurgencies; and (3) to reduce the regional military influence of external actors.⁹² Of course, since ASEAN countries were not powerful enough to effectively mobilize military power for the purpose of regional security, ASEAN prioritized economic growth, social progress, and cultural development.⁹³ Since the 1970s, however, ASEAN started cooperation in political and security affairs. In November 1971, foreign ministers of the ASEAN countries signed a Declaration of a Zone of Peace, Freedom and Neutrality (ZOPFAN) in Southeast Asia. In 1976, the ASEAN countries signed the Treaty of Amity and Cooperation in Southeast Asia (TAC). Since the twentieth century, ASEAN has drawn up a more ambitious blueprint for regional integration. In October 2003, The ASEAN countries signed the Declaration of ASEAN Concord II. The declaration explicitly states that an ASEAN Community shall be established comprising “three pillars, namely political and security cooperation, economic cooperation and social-cultural cooperation.” As for the Security Community, the declaration “is envisioned to bring ASEAN’s political and security cooperation to a higher plane. . . .” The Security Community, while “recognizing the sovereign right of the member countries to pursue their individuals foreign political and defense arrangements and taking into account the strong interconnections among political, economic and social realities,” subscribes to “the principle of comprehensive security as having political, economic, social and cultural aspects in consonance with the ASEAN Vision 2020 rather than to a defense pact, military alliance or a joint foreign policy.” In January 2007, ASEAN issued the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015. This historic ASEAN Charter was signed in November 2007 and entered into force in December 2008. The ASEAN Charter enables ASEAN to a real international organization by prescribing legal status and an institutional framework. It also codifies ASEAN norms, rules, and values; sets clear targets for ASEAN; and presents accountability and compliance. ASEAN devotes itself to “One Vision, One Identity, One Community.”⁹⁴

Obviously, China has a huge geopolitical and economic interest in the Southeast Asia. As a matter of fact, China always seeks to institutionalize relations with ASEAN in order to promote cooperation with ASEAN countries. The most important cooperative apparatus is the “ASEAN+China (10+1)” mechanism. The “ASEAN+China” (10+1) mechanism began with the first China-ASEAN Senior Officials’ Meeting (SOM) in China in 1995. Based on

⁹² S. Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Boulder Colo.: Lynne Rienner, 2002) 13.

⁹³ See ASEAN Declaration (1967).

⁹⁴ ASEAN Charter, art. 36.

this mechanism, many political and legal arrangements have been reached, including the ASEAN-China Economic Agreement in 2002, the Agreement on Trade in Goods (2004), the Agreement on Trade in Service (2007), the Investment Agreement (2009), and so on.⁹⁵ Arguably, ASEAN is the international organization with which China has established the most robust partnership.

In light of the partnership with ASEAN and the slow process of ASEAN integration, people might assume that ASEAN will not pose troubles to the rise of China.

My observation is different. I think that ASEAN might bring about substantial troubles to the rise of China in the long run. First, in light of historical memory, some ASEAN countries are still wary of the rise of China. Second, the Southeast Asian area is of strategic value for China. China's rivals, including the U.S. and Japan, have established comprehensive political, economic, and security connections with ASEAN countries. In particular, the U.S. has built and seeks to expand its alliance relationships in the Southeast Asian area. The U.S. always seeks to use ASEAN as leverage to contain the rise of China. Therefore, U.S. influence on the policies of ASEAN and its member states toward China is a serious concern for China. Third, while China joined the Treaty of Amity and Cooperation in Southeast Asia (TAC) (1976) in 2003 and has substantially legalized its economic ties with ASEAN by concluding investment and trade treaties since the 1990s, ASEAN could not accept China as a new ASEAN Member because any applicant must meet criteria, which include, among other requirements, "location in the recognized geographical region of Southeast Asia." China is at best given a status such as Dialogue Partner, Sectoral Dialogue Partner, Development Partner, and so on.⁹⁶ This means, in other words, China cannot participate in the process of decision-making of ASEAN. Fourth, and maybe most importantly, as ASEAN gradually develops into a Community with "share identity, goals and values,"⁹⁷ it is expected to engage other states including China with "one voice" on more and more issues.

Developments in the maritime security policy of ASEAN signal that China should take seriously potential "collective actions" of ASEAN, even though ASEAN countries could not unify themselves for the time being.⁹⁸ In 1992, ASEAN issued a Declaration of the SCS ("Manila Declaration"). Although the declaration merely expresses an aspiration to resolve disputes with peaceful

⁹⁵ Chien-peng Chung, *China's Multilateral Cooperation in Asia and the Pacific* (London: Routledge, 2010) 78–86.

⁹⁶ ASEAN Charter, arts. 44 and 46.

⁹⁷ *Id.*, art. 35.

⁹⁸ See Michael York, ASEAN's Ambiguous Role in Resolving South China Disputes, 12 *Indonesian J. Int'l L.* 286 (2015).

means, without including any provocative words concerning China, it alarmed China that ASEAN began to view the maritime issue as a common concern. In particular, the Manila Declaration requires that all parties concerned, based on the TAC, establish “a code of international conduct over the South China Sea.”⁹⁹ As a result, in 1999 the Philippines proposed a draft code of conduct on behalf of ASEAN. Although China rejected the draft, it had to consent to further discussions. In March 2000, China and ASEAN submitted their own drafts for discussion.¹⁰⁰ In 2002, ASEAN and China signed the Declaration on the Conduct of Parties in the South China Sea (DOC). The DOC is of significance because, first, ASEAN for the first time engaged “as one side” with China on an issue of strategic importance for the rise of China; and second, the DOC prescribed that China and ASEAN will negotiate a “Code of Conduct” (COC) in the SCS,¹⁰¹ which is likely to impose more constraints on Chinese activities in the SCS. Obviously, the DOC represents a growing number of regional roadblocks potential problem for China. Furthermore, the Declaration of ASEAN Concord II (2003) aimed to enhance cooperation among ASEAN countries on maritime issue. It provides that any maritime issue “shall be addressed regionally in holistic, integrated and comprehensive manner. Maritime cooperation between and among ASEAS member countries shall contribute to the evolution of the ASEAN Security Community.” In 2012, ASEAN senior officials began to draft the COC with the intention of attaining a common ASEAN position before submitting it to China for discussion.¹⁰² In January 2012, the Philippines circulated an informal working draft, but ASEAN Members were divided on several articles.¹⁰³

Little attention has been paid to the potentially negative implications that the ASEAN’s continuous move to a community may bring about for the rise of China and how China seeks to neutralize them. In August 2005, ASEAN presented its draft Guidelines to Implement the DOC to the ASEAN-China Joint Working Group (JWG). The draft includes the call for ASEAN consultations prior to meeting with China. This provision was firmly opposed by China. China persisted in arguing that the disputes concerning sovereignty and jurisdiction of the SCS be resolved with bilateral means. Finally, ASEAN withdrew the call for prior consultation among ASEAN Members.¹⁰⁴ Obviously, any prior

⁹⁹ Manila Declaration (1992), para. 4.

¹⁰⁰ Wu Shicun and Ren Huaifeng, *More Than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea*, 2 *Chinese J. Int’l L.* 311 (2003) 313.

¹⁰¹ The DOC, para. 10.

¹⁰² Carlyle A. Thayer, *ASEAN’s Code of Conduct in the South China Sea: A Litmus Test for Community-Building?*, 34 (4) *Asia-Pac. J.* 1 (2012) 2.

¹⁰³ Carlyle A. Thayer, at 3.

¹⁰⁴ *Id.*, at 2.

consensus among ASEAN Members implies that ASEAN has increased its collective solidarity and strength, which would impose more pressure on China. Furthermore, the Guidelines for the Implementation of the DOC ("Guidelines of DOC (2011)"), which were signed by China and ASEAN in July 2011, add a new provision, providing that any progress on the implementation of the agreed activities and projects under the DOC "shall be reported annually to the ASEAN-China Ministerial Meeting (PMC)."¹⁰⁵ This provision reduces the collective strength of ASEAN. Again, in the negotiations of the COC, ASEAN attempted to develop its own draft first. China strongly insisted that it participate in drafting with ASEAN. It also seems that China divided ASEAN countries at the Twentieth ASEAN Summit held in April 2012. At that summit, Cambodia, the ASEAN Chair, supported the inclusion of China in ASEAN discussion, which was opposed by the Philippines and Vietnam. Finally, a compromise was reached where ASEAN would proceed on its own to draft a COC, but it would keep communication with China.¹⁰⁶ Obviously ASEAN, in the drafting of the COC, appears to have enhanced its collective solidarity against China by maintaining its drafting powers.

2.2.4 China as a Member

In the past several decades, the pattern of behavior by China in international organizations has significantly changed. Initially, China was a "student" in international organizations. For instance, on the eve of his leaving for the New York in 1971, Qiao Guanhua, the first ambassador of the PRC to the UN, admitted: "To tell the truth, we're quite unfamiliar with this institution. We need to honestly study and become familiar as soon as possible, so that China can carry out its duties as permanent member of the Security Council."¹⁰⁷ In meeting with the Chinese delegation, Chairman Mao Zedong warned that China should adopt the attitude of a "student," avoid "rushing into battle unprepared," and "meticulously" consider the complex issues which China would face before making a decision.¹⁰⁸ A similar experience happened to China's engagement with the WTO.¹⁰⁹ Over time, however, China has become more capable of elaborating China's policies, defending China's interests, and handling dispute settlement. In particular, as China is a late comer in international organizations but is

¹⁰⁵ Guidelines of DOC (2011), para. 8.

¹⁰⁶ Carlyle A. Thayer, at 3.

¹⁰⁷ Citing from Joel Wuthnow, *Chinese Diplomacy and the UN Security Council* (London and New York: Routledge, 2013) 15.

¹⁰⁸ *Id.*

¹⁰⁹ Yang Guohua, China in the WTO Dispute Settlement: A Memoir, 49 *J. World Trade* 1 (2015) 1–2.

rising as a new great power, it has spared no effort to “voice” its concerns,¹¹⁰ seeking more influence by, among other things, calling for reforms of some international organizations, especially the IMF.

In the following I examine China’s engagement with the UN and international economic organizations, including the WTO, IMF, and, WB, respectively. Comparatively speaking, China is a status quo power in the UN while being a reformer of international economic organizations.

2.2.4.1 *China and the UN*

The CCP initially applauded the birth of the UN. In 1945, Chairman Mao Zedong contended: “The Chinese Communist Party fully agrees with the proposals of the Dumbarton Oaks conference and the decisions of the Crimea conference on the establishment of an organization to safeguard international peace and security after the war. It welcomes the United Nations conference on International Organization in San Francisco.”¹¹¹ The CCP appointed its own representative joining the ROC-led Chinese delegation to the San Francisco Conference negotiating the establishment of the UN. That policy was reversed as the Korean War broke out in 1950. The PRC condemned its expulsion and stated that “the United States illegally maneuvered the United Nations into adopting resolutions branding China as an ‘aggressor’ and imposing an ‘embargo’ on her.”¹¹² Nevertheless, Tung Pi-wu, a Communist representative of the Chinese delegation to the San Francisco Conference, still argued that the PRC had the right to represent China in the UN. He said that “[t]o keep the People’s of Republic of China out of the United Nations is so unrealistic and so unreasonable that world opinion is calling ever more strongly for an immediate rectification of this extremely abnormal situation . . . The legitimate position and rights of People’s Republic of China in the United Nations must be restored.”¹¹³

In the late 1960s, China began to reconsider its hostile policy toward the UN because on the one hand China-U.S. relations remained antagonistic, and on the other hand, China-Soviet relations had worsened, which culminated in military conflicts at the border area. China recognized that the UN, as a multilateral institution, could help it neutralize strategic pressure from both the U.S. and the USSR. As a result, China adjusted its hostile policy toward the UN, seeking to represent China in the UN in lieu of the ROC. Many developing countries gave their support to China, which demonstrated that China’s

¹¹⁰ As to theory of “voice,” see Albert O. Hirschman, *Exit, Voice and Loyalty* (Cambridge: Harvard University Press, 1974) 30–43.

¹¹¹ Jerome Alan Cohen and Hungdah Chiu eds., *People’s China and International Law: A Documentary Study* (Princeton: Princeton University Press, vol. 2, 1974) 1290

¹¹² Jerome Alan Cohen and Hungdah Chiu eds., at 1294.

¹¹³ *Id.*, at 1294.

strategy of proclaiming itself as a developing country since the 1950s had worked. On October 25, 1971, the UN General Assembly adopted Resolution 2758, deciding “to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.”¹¹⁴ Resolution 2758 accelerated the international recognition of the PRC, pulling China out of international isolation. From 1971 to 1979, some fifty-seven countries established a formal diplomatic relationship with Beijing.¹¹⁵

An exhaustive survey of China’s behaviors in the UN is not necessary because there has been abundant literature in this regard.¹¹⁶ It suffices to mention that there is a consensus among commentators: China kept a low profile in the UN for a long period, as illustrated by the voting of China in the UN Security Council during the period from 1971 to 2000. For instance, China often abstained or did not participate in the UN Security Council voting.¹¹⁷

However, China tends to behave more and more like a great power. China has substantially increased financial and personnel support to the UN. China is extensively involved in the UN’s peacekeeping operations. In particular, China has more frequently exercised “veto power.” For instance China, together with Russia, vetoed several draft resolutions against Syria. A commentator explained that, although it had little personal stake in Syria, Chinese vetoes “are a performative move, announcing to the world that the country will take a more proactive approach in future international conflicts.”¹¹⁸ In other words, China now tends to behave like a great power within the UN.

As a great power, China enjoys *de jure* and *de facto* privileges within the UN. As far as *de jure* privilege is concerned, China is one of the P-5 of the UN Security Council,¹¹⁹ which are vested with “veto power.”¹²⁰ As far as *de facto* privilege is concerned, in 1972, a year after the PRC began to represent China in the UN, a Chinese national was appointed as a Deputy Secretary-General of the UN. As of 2017, another eight Chinese nationals have successively occupied

¹¹⁴ United Nations General Assembly Resolution 2758 Restoration of the lawful rights of the People’s Republic of China in the United Nations, 1976th plenary meeting, October 25, 1971.

¹¹⁵ Joel Wuthnow, at 18.

¹¹⁶ See, e.g., Joel Wuthnow, *Chinese Diplomacy and the UN Security Council: Beyond the Veto* (London and New York: Routledge, 2013).

¹¹⁷ Joel Wuthnow, at 16, 19, 21.

¹¹⁸ Nicholas Wong, “China’s Veto on Syria: What Interests Are at Play?,” available at <https://www.opendemocracy.net/nicholas-wong/china's-veto-on-syria-what-interests-are-at-play> (last visited May 15, 2019).

¹¹⁹ The UN Charter, art. 23(1).

¹²⁰ The UN Charter, art. 27(3).

this high-level position.¹²¹ Those privileges, especially the *de jure* privilege of “veto power,” is of great help for China to defeat many if not all initiatives proposed which China considers unfavorable to its state interests. Take as an example China’s position toward the efforts of several countries, including India and Japan, to seek new permanent membership in the UNSC.¹²² It is not clear whether or not China really supports UN Security Council reform,¹²³ but it is clear that China is unlikely to support Japan and India’s aspiration of seeking permanent membership on the UN Security Council both because they are major strategic rivals for China in the Asia-Pacific region and because both have disputes with China over territorial and maritime demarcation. Therefore it is safe to predict that China would exercise the “veto power” over any initiative supporting that the P-5 is expanded to include Japan and/or India.

2.2.4.2 China and the WTO, the IMF, and the WB

The economic miracle that China has achieved over the past three decades is largely attributable to China’s integration into the international economic order, which is largely governed by the WTO, the IMF, and the WB. Therefore engagement with the three international organizations is of particular significance for the rise of China.

There is a huge body of literature on China and the GATT/WTO,¹²⁴ within which numerous issues have been extensively examined, including why China sought to resume its original status as a contracting party of the GATT in the 1980s, how China conducted the negotiations on its accession to the GATT/WTO, what China brings to the WTO and vice versa, whether or not China

¹²¹ Available at http://news.ifeng.com/a/20170726/51510821_0.shtml (last visited May 15, 2019).

¹²² As to the reform initiatives of the UNSC, see generally Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, United Nations, 2004; Lau Malksoo, *Great Powers Then and Now: Security Council Reform and Responses to Threats to Peace and Security*, in *United Nations Reform and the New Collective Security* (Perter G. Danchin and Horst Fischer eds., Cambridge: Cambridge University Press, 2010) 94–114; Joint Press Statement at the Meeting of Foreign Ministers of the G-4 Countries-Brazil, Germany, India and Japan on United Nations Security Council Reform on the Occasion of 72nd Session of UN General Assembly, New York, September 20, 2017.

¹²³ MFA of China, Position Paper of the People’s Republic of China on the United Nations Reforms, Part IV.3.

¹²⁴ See, e.g., Deborah Z. Cass, Brett G. Williams, and George Barker eds., *China and the World Trade System: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003); Ching Cheong and Ching Hung Yee, *Handbook on China’s WTO Accession and Its Impacts* (New Jersey: World Scientific, 2003); Henry Gao and Donald Lewis eds., *China’s Participation in the WTO* (London: Cameron May Ltd., 2005); Hui Feng, *The Politics of China’s Accession to the World Trade Organization* (London: Routledge, 2006); Francis Snyder, *The EU, the WTO and China* (Oxford: Hart Publishing, 2010); Wang Loulin, *China’s WTO Accession Reassessed* (New York: Routledge, 2015); Yen Kong Ngangjoh Hodu and Zhang Qi, *The Political Economy of WTO Implementation and China’s Approach to Litigation in the WTO* (Cheltenham: Edward Elgar Publishing, 2016).

fully complies with the WTO obligations, how China handles WTO disputes, and so on.

As I have done concerning China and the UN, here I merely stress two points on the relationship between the WTO and China from the perspective of the rise of China.

First, the WTO is the most efficient institution by which China rapidly expanded its economic power. This is because the WTO rules, for instance, the MFN, NT, general elimination of quantitative restrictions, transparency and dispute settlement mechanism, largely pave the way for Chinese traders to compete for trade opportunities and enabled China's government to effectively defend its trade interests. By contrast, while UN membership significantly enhances China's political influence in international affairs, it makes little difference in expanding China's economic power. Similarly, although the IMF and the WB provide policy inputs and development loans to China,¹²⁵ they, unlike the WTO, cannot directly open or create trade market for Chinese traders and producers. In other words, the IMF and the WB are not as efficiently as the WTO in expanding Chinese economic power.

In 2001, when China was admitted as a WTO Member, China's trade volume in goods was over US\$500 billion, ranking as the sixth largest trading power in the world.¹²⁶ In 2010, less than ten years after its WTO accession, that number reached US\$2.974 trillion. In that year, China's total export and import accounted for 10.4 percent and 9.1 percent of the world's total, respectively, making China the world's largest exporter and second-largest importer. China's trade in services also sharply expanded. In 2005, China's surplus in trade goods reached US\$100 billion for the first time.¹²⁷ In 2017, China's trade surplus had amounted to around US\$421.44 billion.¹²⁸

Second, China appears to have enjoyed some privileges as it becomes a leading trading power. As early as 2003, Jackson speculated that China would assert its "right" to a seat at the AB much like the U.S., the EU, and Japan, which

¹²⁵ According to an important report submitted to the State Council prepared by the People's Bank of China, the Ministry of Finance, and the MOFCOM. The benefits which China attained from participation in the IMF and the WB included: (1) it would expel the ROC from the two institutions, which represented a major diplomatic victory for the PRC; (2) it would embody the representation of China in the UN by sitting in the UN's affiliates, including the two institutions; (3) it would reinforce the bilateral relations between China and other countries within the two institutions; (4) it would acquire more information about international finance and economics, which was of help for China to launch a development project; (5) it would be eligible for concessional interest rate and IMF drawing privileges. Harold K. Jacobson and Michel Oksenberg, at 70.

¹²⁶ "Chinese foreign trade ranked the sixth in the world in 2001" (May 9, 2002), available at <http://finance.sina.com.cn/o/20020509/204216.html>.

¹²⁷ China's Foreign Trade (2011), Part IV.

¹²⁸ "China: Trade balance from 2007 to 2017 (in billion U.S. dollars)," available at <https://www.statista.com/statistics/263632/trade-balance-of-china/> (last visited October 10, 2018).

“tend to think that they should have one of those Appellate Body seats reserved for them.”¹²⁹ Jackson’s speculation has come to reality. Zhang Yuejiao, a former senior trade official of China, was appointed as a member of the AB in 2008,¹³⁰ just seven years after China attained the WTO membership. In 2016, Zhao Hong, another Chinese senior trade official, became the second member of the AB from China.¹³¹

As far as the IMF and the WB are concerned, developing countries, including China, were traditionally marginal in these international financial institutions. Arguably recognizing that China could not exert meaningful influence, the PRC leaders were reluctant to apply for a seat in the IMF in the mid-1970s.¹³² Furthermore, shortly after the resumption of IMF membership on behalf of China in April 1980, the PRC urged that China’s voting power in the IMF be increased.¹³³ Until 2010, however, China had only 3.81 percent of total voting power in the IMF, far behind the U.S. (16.73%) and also less than Japan (6.23%), Germany (5.39%), France (4.09%), and the U.K. (4.09%).

As China and several other developing countries gradually expanded their economic power, especially after the global economic crisis of 2008, they strongly argued that their voting powers in international financial institutions should be increased proportionately. In 2010 China, together with other BRICS countries, for the first time presented proposals to reform the IMF and the WB. At the Brasilia Summit in April of that year, they announced:

The IMF and the World Bank urgently need to address their legitimacy deficits. Reforming these institutions’ governance structures requires first and foremost a substantial shift in voting power in favor of emerging market economies and developing countries to bring their participation in decision making in line with their relative weight in the world economy . . . We do also agree on the need for an open and merit based selection method, irrespective of nationality, for the heading positions of the IMF and the World Bank. Moreover, staff of these institutions needs to better reflect the diversity of their membership. There is a special need to increase participation of developing countries. The international community must deliver a result worthy of the

¹²⁹ John H. Jackson, at 29.

¹³⁰ “Appellate Body welcomes two new members,” available at https://www.wto.org/english/news_e/news08_e/ab_may08_e.htm (last visited May 15, 2019).

¹³¹ “WTO welcomes two new Appellate Body members,” available at https://www.wto.org/english/news_e/news17_e/ab_25jan17_e.htm (last visited May 15, 2019).

¹³² Eric Helleiner and Jonathan Kirshner eds., *The Great Wall of Money* (Ithaca: Cornell University Press, 2014) 63.

¹³³ *Id.*, at 67.

expectations we all share for these institutions within the agreed timeframe or run the risk of seeing them fade into obsolescence¹³⁴

As a reply, in December 2010, the Board of Governors of the IMF approved a package of reforms which were scheduled to finish by October 2012.¹³⁵ The reforms did not make any perceivable progress, however. As a result, at the Sixth BRICS Summit in 2014, China, together with other BRICS countries, warned that this situation would damage “the IMF’s legitimacy, credibility and effectiveness” and that the reform “must lead to the modernization of its governance structure.”¹³⁶ In particular, they called for developed countries to “meet their commitment to cede two chairs on the Executive Board of the IMF.”¹³⁷

Under strong pressure from China and other developing countries, developed countries have begun to make some compromises. As a result, China is increasing its power in the IMF and the WB. In 2018, China’s voting power in the WB reached 4.53 percent of the total voting power, second only to the U.S. (16.25%) and Japan (7.01%). Similarly, China has increased its voting power to 6.09 percent in the IMF in 2018, overtaking Germany (5.32%), France (4.03%), and the U.K. (4.03%) and becoming the third largest voter next to the U.S. (16.52%) and Japan (6.15%). However, an important thing is that the power of “veto” that the U.S. enjoys within the IMF¹³⁸ and the WB¹³⁹ remains intact because the U.S. still occupies more than 15 percent of total voting power. This means the U.S. is still a dominant state in both the IMF or the WB and accordingly China is unlikely to acquire voting power that is truly proportional to its growing economic power. As suggested later, this is a major reason why China decides to sponsor new international financial institutions such as the AIIB.

In addition, as noted previously,¹⁴⁰ international institutions bring about benefits and costs for member states. Comparatively speaking, the costs that China paid for its WTO membership are far larger than those paid to the IMF and the WB. This is a major reason why China took fifteen years to finish the negotiations of China’s GATT/WTO accession starting in 1986 while China completed negotiations for IMF and WB membership within less than one year

¹³⁴ BRIC—Brazil, Russia, India and China Grouping II Summit of Heads of State/Government, Brasilia, April 15, 2010, Joint Statement, para. 11.

¹³⁵ “Press Release: IMF Board of Governors Approves Major Quota and Governance Reforms,” available at <https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr10477> (last visited October 10, 2018).

¹³⁶ VI BRICS Summit Fortaleza Declaration, July 15, 2014, para. 18.

¹³⁷ 8th BRICS Summit—Goa Declaration, Goa, India, October 16, 2016, para. 32.

¹³⁸ IMF Articles of Agreement, art. 5, sec. 7.

¹³⁹ IBRD Articles of Agreement, art. 8.

¹⁴⁰ See Section 2.1.

from 1979. This demonstrates how China engages with international organization changes based on its interest calculation.

2.2.5 China as a Sponsor

Clearly, the U.S. achieves and sustains its hegemony by relying on its own sweeping powers, but also by relying on international organizations that it sponsors.¹⁴¹ That sponsorship can often privilege the sponsoring states in drafting the constitutional instruments, locating the headquarters, nominating the leaders, recruiting the staff, setting agendas, shaping institutional culture, and so on. By contrast, other countries that participate in international organizations often find that they are disadvantaged in many aspects. For instance, they often cannot help but pay higher entrance fees, become rule-takers, and adapt to the established institutional culture.

In the past several decades, China has prioritized to increase its participation in the international legal order, including international organizations with an important aim to internationally socialize itself. This policy has begun to change as China rises. While it continues its participation and to seek more say in international organizations, China also seeks to sponsor international organizations. This represents a fundamental change of Chinese international legal policies and practice.

The Shanghai Cooperation Organization (SCO), which was founded in 2002 in Shanghai, was the first international organization which China sponsored. Since the second ten years of the twenty-first century, China has been more proactive in this regard: with China's sponsorship, the New Development Bank (NDB) was established in 2014;¹⁴² and then the Asian Infrastructure Investment Bank (AIIB) was established in 2015.¹⁴³ In addition, the SCO has a plan to establish a development bank.¹⁴⁴

China's new policy of sponsoring international organizations invites different reactions. Some persons welcome China-sponsored international organizations that they can enhance for more efficient and fair international governance. They assume that the newly created international organizations can prompt existing ones to be more responsive and expect cooperation and friendly competition between them.¹⁴⁵ Some others are concerned, however, that China-sponsored

¹⁴¹ See generally Rosemary Foot, S. Neil MacFarlane, and Michael Mastanduno eds., *US Hegemony and International Organizations* (Oxford: Oxford University Press, 2003).

¹⁴² Agreement on the New Development Bank, Fortaleza, July 15, 2014.

¹⁴³ The Articles of Agreement of the Asian Infrastructure Investment Bank, Beijing, June 29, 2015.

¹⁴⁴ Bishkek Declaration by the Heads of the Member States of the Shanghai Cooperation Organization, September 13, 2013.

¹⁴⁵ See, e.g., Tamara Fisher, China and the New Development Bank: The Future of Foreign Aid, 38 *Loy. L.A. Int'l & Comp. L. Rev.* 141 (2016); David M. Ong, The Asian Infrastructure Investment Bank: Bring "Asian Value" to the Global Economic Governance?, 20 *J. Int'l Econ. L.* 535 (2017);

international organizations might operate in an irresponsible manner and that they might disrupt, though being less likely to fully replace, the established international order.¹⁴⁶ China's policy shift alarms the U.S. in particular. The U.S. is highly alert that these newly founded international organizations will be instrumentalized to challenge American hegemony. Thus, Washington is often critical of these institutions. In particular it discourages other countries, especially its allies, from joining them.¹⁴⁷

In response, China has explained that China-sponsored international organizations (1) do not replace existing ones; rather, they are complementary with each other; (2) draw on the best practices of and conduct cooperation with existing international institutions; and (3) belong to the family of public goods which China provides for international community.¹⁴⁸

2.2.5.1 *China and the SCO*

The Shanghai Cooperation Organization (SCO) originated from a series of security arrangements between China and former members of the Soviet Union. China, Kazakhstan, Kyrgyzstan, Russia, and Tajikistan ("Shanghai Five") signed the "Agreement on deepening military trust in border regions" in Shanghai in 1996 and the "Agreement on reduction of military forces in border regions" in Moscow in 1997. Uzbekistan was invited to attend the Shanghai Five Summit held in Dushanbe in 2000. In June 2002, the Shanghai Five and Uzbekistan decided to institutionalize their cooperation by signing the Declaration on Establishment of Shanghai Cooperation Organization. In June 2002 the six countries signed the SCO Charter, which entered into force in September 2003. According to the SCO Charter, the SCO headquarters is in Shanghai. The SCO expanded for the first time in June 2017 by admitting India and Pakistan as new members.¹⁴⁹ The admission of India and Pakistan significantly increases the strategic importance of the SCO in international relations. In addition, as of 2018, the SCO has four observer states and six dialogue partners.¹⁵⁰ The SCO

Xiaohui Wu, Friendly Competition for Co-Progressive Development: The Asian Infrastructure Investment Bank vs. the Bretton Woods Institutions, 16 *Chinese J. Int'l L.* 41 (2017).

¹⁴⁶ See, e.g., Agustina Vazquez, Is the BRICS New Development Bank a Fledgling Alternative to the World Bank, 4 *BRICS L.J.* 3 (2017).

¹⁴⁷ Daniel Weiser, "Does the US Fear the Asian Infrastructure Investment Bank?," available at <https://www.investopedia.com/articles/investing/040915/does-us-fear-asian-infrastructure-investment-bank.asp>.

¹⁴⁸ See, e.g., Xi Jinping, Speech at the Opening Ceremony of the AIIB (January 16, 2016), available at http://www.xinhuanet.com/english/china/2016-01/16/c_135015661.htm.

¹⁴⁹ The Astana declaration of the Heads of State of the Shanghai Cooperation Organisation, Astana, June 9, 2017.

¹⁵⁰ Four Observer States include Afghanistan, Belarus, Iran and Mongolia and Dialogue Partners include Azerbaijan, Armenia, Cambodia, Nepal, Turkey, and Sri Lanka, see "About SCO," available at http://eng.sectsc.org/about_sco/ (last visited May 15, 2019).

also seeks cooperation with other international organizations.¹⁵¹ For instance, the SCO holds an observer status in the UN General Assembly.¹⁵²

The SCO aims, among others, to strengthen mutual trust, friendship, and good neighborliness between the member states; develop multifaceted cooperation in the maintenance and strengthening of peace, security, and stability in the region and promotion of a new democratic, fair, and rational political and economic international order; jointly combat terrorism, separatism, and extremism; facilitate comprehensive and balanced economic growth and social and cultural development; and promote enjoyment of human rights and fundamental freedoms in accordance with the international obligations of the member states and their national legislation.¹⁵³ The main areas of cooperation within the SCO include, *inter alia*, the maintenance of peace and enhancing security and confidence in the region; searching for common positions on foreign policy issues of mutual interest; development and implementation of measures aimed at jointly counteracting terrorism, separatism, and extremism; support for and promotion of regional economic cooperation in various forms, fostering a favorable environment for trade and investments with a view to gradually achieving free flow of goods, capitals, services, and technologies; and effective use of available transportation and communication infrastructure, improvement of transit capacity of the member states, and development of energy systems. Cooperation to maintain regional security is a priority for the SCO.¹⁵⁴ SCO Members are required to adhere to principles which, in particular, include mutual respect of sovereignty, independence, territorial integrity of states and inviolability of state borders, nonaggression, noninterference in internal affairs, nonuse of force or threat of its use in international relations, seeking no unilateral military superiority in adjacent areas, and, particularly important, prevention of “any illegitimate acts directed against the SCO interests.”¹⁵⁵

This potential significance of the SCO for China and international order has not yet been fully recognized. According to some observers, the SCO has conspicuous defects. Unlike most international organizations, the SCO Charter provides no judicial means to resolve potential disputes among member states apart from consultation and negotiation.¹⁵⁶ For instance, Mutlaq Al-Qahtani contends that this is “unfortunate” and he suggests an SCO Court of Justice to

¹⁵¹ “External Communication,” available at <http://eng.sectsco.org/cooperation/#2> (last visited May 15, 2019).

¹⁵² Resolution A/RES/59/48, December 24, 2004.

¹⁵³ The SCO Charter, art. 1; Declaration on the Establishment of the SCO, para. 2.

¹⁵⁴ The SCO Charter, art. 3; Declaration on the Establishment of the SCO, para. 8.

¹⁵⁵ The SCO Charter, art. 2.

¹⁵⁶ *Id.*, art. 22.

make the dispute settlement mechanism of the SCO effective.¹⁵⁷ Also, Stephen Blank argues that the SCO “has done little to provide genuine security.”¹⁵⁸ This argument is in a sense sound because, apart from announcing to ensure “prevention of any illegitimate acts directed against the SCO interests,”¹⁵⁹ the SCO Charter does not include similar collective security mechanisms to those that exist in the UN or NATO. Furthermore, Blank suggests that there is no real trust between China and Russia, two major players within the SCO. Russia is wary that it will be marginalized as a second player and China will finally dominate the SCO.¹⁶⁰

I have a different observation, however. I am of view that the SCO’s moderate ambition is in the interest of China in terms of peace and security at least. Firstly, China attains a great security interest from the SCO, which is the first regional security organization where China holds membership. On the one hand, it is expected that potential security conflicts between China and other SCO countries can be significantly reduced, if not eliminated. On the other hand and more importantly, given the requirement of prohibiting “any illegitimate acts directed against the SCO interests,”¹⁶¹ any other security organizations potentially targeting China should not be allowed to be formed in SCO countries.¹⁶² Thus, China enjoys an important “community right” against other SCO countries in the field of peace and security. This significantly improves China’s strategic security. As a matter of fact, the SCO leaders demanded that the U.S. and other NATO countries in July 2005, in the light of the completion of the antiterrorist military operations in Afghanistan, set a timetable to withdraw their military forces from Central Asia, including the SCO countries.¹⁶³ This explains why the U.S. is wary that the SCO damages American interests in Central Asia.¹⁶⁴ Secondly, some Western observers are wary about the future ambition of the SCO, suggesting that it is likely to emerge as neo-Soviet bloc of authoritarian Eurasian countries—a kind of “NATO of the East.”¹⁶⁵ The lack of robust collective security mechanism in the SCO implies that China, a leading

¹⁵⁷ Mutlaq Al-Qahtani, *The Shanghai Cooperation Organization and the Law of International Organizations*, 5 *Chinese J. Int’l L.* 129 (2006) 139.

¹⁵⁸ Stephen Blank, *Making Sense of the Shanghai Cooperation Organization*, 14 *Geo. J. Int’l Aff.* 39 (2013) 40.

¹⁵⁹ SCO Charter, art. 2.

¹⁶⁰ Stephen Blank, *id.*, at 40–41.

¹⁶¹ SCO Charter, art. 2.

¹⁶² Stephen Blank, *id.*, at 41.

¹⁶³ See Richard Weitz, *The Shanghai Cooperation Organization: The Primakov Vision and Central Asian Realities*, 31 *Fletcher F. World Aff.* 103 (2007) 107.

¹⁶⁴ *Shanghai Cooperation Organization: Is it Undermining U.S. Interests in Central Asia* (September 26, 2006), 41 Series 3: Basket III Hearings before the U.S. Commission on Security and Cooperation in Europe and Other Selected Congressional Hearings, Reports and Prints I, [ii] (2006).

¹⁶⁵ Richard Weitz, at 103–104.

SCO Member, does not legally impose on “community obligation” in the field of peace and security toward other SCO countries by providing military assistance and such. China thus reduces the risk of being involved in potential conflicts between other SCO countries and those between any SCO country with non-SCO countries (for instance, the U.S.), or other security organizations (for instance, the NATO). Thirdly, the SCO has institutionalized the relations between China and its like-minded countries that are considered authoritarian countries.¹⁶⁶ This facilitates the cooperation within the SCO to develop their own regional legal order,¹⁶⁷ which might influence the global legal order. For instance, the SCO Members, in defining terrorism, include the unique conception of “separatism” and “extremism,”¹⁶⁸ which presumably is not fully in concord with international human rights norms.¹⁶⁹ Similarly, the SCO countries have developed their conception of cyberspace sovereignty,¹⁷⁰ which is expected to significantly influence the development of international law on cyberspace.

In addition to the cooperation in peace and security, another priority of China is to promote economic integration among the SCO countries, which also is of significance for the rise of China, especially energy security. It seems that China's attempt is discouraged by Russia, which is far less economically powerful than China. Thus, Russia is wary that it will be a second-class member to other SCO countries in the SCO economic integration.¹⁷¹ Thus, whether the SCO further develops itself into an economic integration organization remains to be seen.

2.2.5.2 *China and the AIIB*

The establishment of the Asian Infrastructure Investment Bank (AIIB) was first proposed by President Xi Jinping in his speech delivered before the Asia-Pacific Economic Cooperation (APEC) Chief-Executive Officers (CEO)

¹⁶⁶ *Id.*, at 110–111.

¹⁶⁷ David Ward, *The Shanghai Cooperation Organization's Bid to Transform International Law*, 11 *Int'l L. & Mgmt. Rev.* 162 (2015).

¹⁶⁸ The SCO Charter, art. 1; Convention of the Shanghai Cooperation Organization against Terrorism (2009); the Concept of the Shanghai Cooperation Organization Member States to Combat Terrorism, Separatism and Extremism (2005); Agreement on Regional Anti-Terrorist Structure between the Member States of the Shanghai Cooperation Organization (2002); Shanghai Convention on Combating Terrorism, Separatism and Extremism (2001); Statement by the heads of the member states of the Shanghai Cooperation Organisation on joint counteraction to international terrorism (2017).

¹⁶⁹ David Ward, at 185.

¹⁷⁰ See International code of conduct for information security, A/69/723, January 13, 2015; International code of conduct for information security, A/66/359, September 14, 2011.

¹⁷¹ Stephen Blank, at 45. See generally Fabio Indeo, *Russia and China in Central Asia: growing geopolitical competition*, ISPI, Policy Brief (No. 199 – October 2010).

Summit in Indonesia in October 2013.¹⁷² After about one year of intensive consultations, China won support from twenty other Asian countries.¹⁷³ In October 2014, twenty-one countries, including China, signed a Memorandum of Understanding regarding the AIIB in Beijing. A breakthrough occurred in March 2015. On March 12, the U.K. applied for a founding membership of the AIIB, making it the first developed economy to show support for the AIIB. The decision of the U.K. highly frustrated the U.S., which endeavored to discourage its allies to join the AIIB.¹⁷⁴ The U.K. spurred a wave of applications of Western states for AIIB membership. Five days later, France, Germany, and Italy applied together for founding AIIB membership. By March 31, 2015, the deadline to apply for founding membership, the AIIB had attracted fifty-seven Preliminary Founding Members (PFMs), including four out of five permanent members of the UNSC, four out of the G-7 countries, and fourteen out of the G-20 countries.

The AIIB Articles of Agreement (AIIB Agreement) was signed by fifty-seven PFMs in Beijing on June 29, 2015, and entered into force on December 25, 2015. On January 1, 2016, the AIIB was open for business. Mr. Jin Liquan, a former Chinese vice financial minister, was appointed as the president. On the same day, the AIIB signed a Headquarter Agreement with China in accordance with which the AIIB became headquartered in Beijing. As of May 2019, the number of members of the AIIB has reached ninety-seven, including forty four Regional Members (RMs) and twenty-six Non-regional Members (NRMs), and twenty-seven prospective members;¹⁷⁵ the Bank has approved of thirty-eight projects¹⁷⁶ and twenty projects have been proposed.¹⁷⁷ The Bank has established an institutional structure, regulations and rules, and operation policies, drawing on the practice of other international financial institutions with its own unique characteristics. Importantly, it appears that the AIIB operates well. For instance, S&P Global Ratings announced that it gave the highest rating to

¹⁷² Xi Jinping, Having Full Confidence in China's Economic Development Prospects to Build a Better Asia-Pacific That Will Guide the World and Benefit All Parties and the Offspring (Speech at the APEC CEO Summit), the APEC CEO Summit Bali, Indonesia (October 7, 2013).

¹⁷³ These twenty countries include Bangladesh, Brunei, Cambodia, India, Kazakhstan, Kuwait, Lao, Malaysia, Mongolia, Burma, Nepal, Oman, Pakistan, the Philippines, Qatar, Singapore, Sri Lanka, Thailand, Uzbekistan, and Vietnam.

¹⁷⁴ "US anger at Britain joining Chinese-led investment bank AIIB," available at <https://www.theguardian.com/us-news/2015/mar/13/white-house-pointedly-asks-uk-to-use-its-voice-as-part-of-chinese-led-bank> (last visited May 10, 2019).

¹⁷⁵ "Members and Prospective Members of the Bank," available at <https://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html> (last visited May 20, 2019).

¹⁷⁶ "Approved Projects," available at <https://www.aiib.org/en/projects/approved/index.html> (last visited May 20, 2019).

¹⁷⁷ "Proposed Projects," available at <https://www.aiib.org/en/projects/proposed/index.html> (last visited May 20, 2019).

the AIIB, namely, “AAA/A-1+” in August 2017, no more than two years after the AIIB started its business.¹⁷⁸

According to China, the AIIB initiative is based on the huge need of financing infrastructure in developing states, including Asian countries.¹⁷⁹ Infrastructure development would greatly expand Asian regional connectivity and improve regional integration. However, many Asian countries face considerable financial barriers to improving their infrastructure.¹⁸⁰ Thus, the AIIB has aimed to “remove the financing bottlenecks” which Asian countries face.¹⁸¹ It is expected that infrastructure investment will “foster sustainable economic development, create wealth and improve infrastructure connectivity in Asia” and, in collaboration with other international development institutions, “promote regional cooperation and partnership in addressing development challenges.”¹⁸²

However, China later gave a slightly different explanation for the AIIB initiative. According to China’s President Xi Jinping, the birth of AIIB reflects the change of the world economic structure which calls for a more fair and equitable global system of economic governance.¹⁸³ China, by sponsoring the AIIB, demonstrates its willingness to shoulder “more international responsibilities” and to provide “international public goods.”¹⁸⁴ Indeed, it is widely believed that a major reason for China’s AIIB initiative is that China complains that, in light of its economic power, it was poorly treated in current international financial institutions, including the IMF, the WB, and the Asian Development Bank (ADB).¹⁸⁵ Therefore, it can be argued that the AIIB initiative serves to achieve China’s ambition of rising as a new great power.

From its inception, the AIIB did not limit its membership to Asian countries. Rather, it was immediately open to all members of the IBRD and the ADB. Thus, the AIIB members include RMs and NRMs.¹⁸⁶ However, RMs and NRMs are differentiated on a few but important matters. For instance, the president of the AIIB shall not be a national from any NRMs but from an RM.¹⁸⁷ Furthermore, the percentage of capital stock which RMs initially occupy is 75 percent of the total subscribed capital stock,¹⁸⁸ and the subscription of any

¹⁷⁸ “AIIB Receives Third Triple-A Credit Rating,” available at https://www.aiib.org/en/news-events/news/2017/20170718_001.html (last visited May 20, 2019).

¹⁷⁹ Xi Jinping, Speech at the APEC CEO Summit.

¹⁸⁰ AIIB Agreement, Preamble.

¹⁸¹ *Id.*

¹⁸² AIIB Agreement, art. 1(1).

¹⁸³ Xi Jinping, Speech at the Opening Ceremony of the AIIB, Beijing, January 16, 2016.

¹⁸⁴ *Id.*

¹⁸⁵ Daniel C. K. Chow, Why China Established the Asia Infrastructure Investment Bank, 49 *Vand. J. Transnat’l L.* 1255 (2016) 1258.

¹⁸⁶ AIIB Agreement, art. 3(1).

¹⁸⁷ *Id.*, art. 29(1).

¹⁸⁸ *Id.*, Schedule A.

new AIIB member shall not reduce this percentage, unless otherwise agreed by the Board of Governors (BG) by a Super Majority vote.¹⁸⁹ Moreover, nine out of the twelve total members of the Board of Directors (BD) shall be nationals of RMs and the other three from NRMs.¹⁹⁰ Thus on the one hand, the AIIB, by admitting NRMs, exhibits openness that enhances the legitimacy of the AIIB; on the other hand, other great powers like the U.K., France, Germany, and—if admitted someday—the U.S. which are NRMs are precluded from playing a dominant role in the AIIB, as they have done in the IMF and the WB. These arrangements make China likely to maintain its role as the largest player in the AIIB.

The initial authorized capital stock of the AIIB is US\$100 billion, which is divided into one million shares having a par value of US\$100,000 each. However, the BG can decide to increase this initial authorized capital by a Super Majority vote.¹⁹¹ Currently, China's share is US\$297,804, and its capital subscription is US\$29,780.4 million.¹⁹² According to the AIIB voting right formula, in May 2019 China accounts for 30.89 percent of the total authorized capital and 26.61 percent of the total voting right,¹⁹³ reducing from 31.34 percent and 26.92 percent respectively in December 2018.¹⁹⁴

The AIIB has a BG, a BD, a president, and one or more vice presidents.¹⁹⁵ The BG is vested with “all powers,” including the admission of new members and the qualification, the increase or decrease of authorized capital, and the election of directors and the president.¹⁹⁶ Generally speaking, however, it does not involve itself in the operation of the AIIB. Furthermore, the working pattern of the BD is distinct from that of the IMF or WB, namely, it functions “on a non-resident basis except as otherwise decided by the BG by a Super Majority vote” and meets as often as the business of the Bank may require.¹⁹⁷ The BD is merely responsible for the “direction of the general operation” of the AIIB.¹⁹⁸ This nonresident arrangement reduces the bureaucracy, enhancing the AIIB by making it more efficient.¹⁹⁹ The president is elected by the BG by a Super Majority vote.²⁰⁰ Given the current structure of authorized capital stock,

¹⁸⁹ *Id.*, art. 5(3).

¹⁹⁰ *Id.*, art. 25(1).

¹⁹¹ *Id.*, art. 4(1)(3) and art. 28.

¹⁹² *Id.*, Schedule A.

¹⁹³ *Id.*, art. 28; “Members and Prospective Members of the Bank,” available at <https://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html> (last visited May 20, 2019).

¹⁹⁴ “Members and Prospective Members of the Bank,” available at <https://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html> (last visited December 10, 2018).

¹⁹⁵ AIIB Agreement, art. 21.

¹⁹⁶ *Id.*, arts. 22 and 23.

¹⁹⁷ *Id.*, art. 27(1).

¹⁹⁸ *Id.*, arts. 25 and 26.

¹⁹⁹ Bin Gu, Chinese Multilateralism in the AIIB, 20 *J. Int'l Econ. L.* 137 (2017) 151–152.

²⁰⁰ AIIB Agreement, art. 29(1)(2).

the president must be a Chinese national or a person whom China supports. The president shall conduct, under the direction of the BD, the business of the Bank, including the recommendation of vice presidents for approval by the BD, and the organization, appointment, and dismissal of the officers and staff.²⁰¹ Obviously, the nonresidence of directors makes the president enjoy substantial discretion in operating the Bank.

The AIIB Agreement provides three forms of vote casting in the BG: Simple Majority, Super Majority and Special Majority. The Super Majority vote requires an affirmative vote of two-thirds of the total number of governors, representing not less than “three-fourths” of the total voting power of the members. The Special Majority vote requires an affirmative vote of a majority of the total number of governors, representing not less than one half of the total voting power of the members.²⁰² In accordance with the AIIB Agreement, matters such as the admission of new members and their qualification, the increase or decrease of authorized capital, and the election of directors and the president,²⁰³ shall be decided by a Super Majority vote.²⁰⁴ This implies that, under the current the structure of authorized capital stock, China enjoys the same “veto power” as the U.S. does in the IMF or the WB. Interestingly, Shi Yaowei, China’s chief negotiator for the AIIB, explains that “the share and voting power of each member may decrease as new members will be admitted to the AIIB. Therefore, the so-called issue of whether China seeks or abandons the veto power is a Non-issue.”²⁰⁵ It remains to be seen, however, whether in the future China could accept its voting power to be reduced to the extent that it loses the “veto power.”

Concerns have been raised with respect to the ways that China, as the bank’s largest contributor, exercises its power in the AIIB. In early 2015, Jin Liqun explained that China would not abuse its status of the largest shareholder of the AIIB, and the AIIB, once being founded, would make decision by consensus instead of vote casting.²⁰⁶ In the early 2018, two years after the AIIB was established, Jin said, China as the largest shareholder has set a good model, with full respect for the AIIB operation. According to Jin, those BD members, upon being asked by international rating agencies, unanimously confirmed that China has never imposed undue pressure. Jin suggested that, for China, the

²⁰¹ *Id.*, arts. 29(4) and 30(1)(2).

²⁰² *Id.*, art. 28(2).

²⁰³ *See, e.g.*, arts. 4(3), 5(2)(3), 29(1).

²⁰⁴ Arts. 28(2)(ii).

²⁰⁵ “The Issue of Abandoning the Veto Power Does Not Exist,” available at <http://news.sina.com.cn/o/2015-03-26/025931645768.shtml> (last visited May 10, 2019).

²⁰⁶ “Jin Liqun Delivered Speech at China Development Forum,” available at <http://cwf.scu.edu.cn/idsInformationList.htm?action=idsInformationDetail&idsId=1701426744982340&idsId=1701417164127745> (last visited May 10, 2019).

largest achievement was to make the AIIB a “really international” financial institution and to operate better than other international financial institutions.²⁰⁷ In other words, while the AIIB is a multilateral financial institution in which China is the largest shareholder, it absolutely is not merely “China’s bank.”²⁰⁸

Another concern is whether the AIIB cooperates or competes with existing international financial institutions. The AIIB arguably is not meant to substitute for, but rather to supplement existing international financial institutions; its goal is not to disrupt but to improve the current international financial order.²⁰⁹ On the one hand, other international financial institutions give important supports to the AIIB.²¹⁰ On the other hand, the AIIB draws on the good practice of other multilateral development institutions in governance structure, environmental and procurement policies, and so on.²¹¹

For the time being, the AIIB focuses on infrastructure investment, which limits its influence. However, the creation of the AIIB represents a far-reaching event which not only bring about fundamental implications on the rise of China but also presumably has potential to reshape the international economic order.

Firstly, the AIIB is a prism through which China alleviates the wariness of many other countries as to whether a rising China will behave in a responsible way in the international community. In contrast with the SCO, which has limited membership and a focus on security issues, the AIIB is a multilateral institution with eighty members in which China is simply *a* leading member. Therefore, how the AIIB operates and, specially, how China exercises its leadership, must be closely scrutinized by both AIIB members and the rest of the world. As Jin Liqun suggested, other initiatives that China will propose in the future can obtain support from other countries only if the AIIB is well operated.²¹² This explains why Jin stressed that the AIIB absolutely was not “China’s bank.”

Secondly, the AIIB can enhance and justify China’s One Belt and One Road Initiative (BRI). The BRI is a grand strategy aimed to enhance the rise of China. China hopes that the AIIB and other international financial institutions will participate in the BRI.²¹³ According to Jin Liqun, the AIIB facilitates the policy coordination among BRI countries and gives special consideration for those

²⁰⁷ “Jin Liqun, Making the AIIB a Really International Institution Is the Largest Achievement for China,” available at http://finance.ifeng.com/a/20180116/15928206_0.shtml (last visited May 10, 2019).

²⁰⁸ *Id.*

²⁰⁹ Xi Jinping, Speech at the Opening Ceremony of the AIIB, January 16, 2016.

²¹⁰ “Jin Liqun delivered speech at 2015 China Development Forum.”

²¹¹ Xi Jinping, Speech at the Opening Ceremony of the AIIB, January 16, 2016.

²¹² Jin Liqun, Making the AIIB a Really International Institution Is the Largest Achievement for China.

²¹³ Xi Jinping, Speech at the Opening Ceremony of the AIIB, January 16, 2016.

infrastructure projects in BRI countries.²¹⁴ The AIIB can also enhance the interconnectivity between China and other BRI countries.²¹⁵ With cooperation and coordination with the AIIB, it is suggested that China, in carrying out the BOR initiative, can benefit from the AIIB in four aspects. First, the AIIB will enhance the legitimacy of the BRI. As noted previously, a major reason China identifies the BRI as an “initiative” instead of a “strategy” is that the latter might raise a serious concern among other countries that China will seek hegemony through the BRI. The involvement of the AIIB in whatever way can increase the confidence of BRI countries on China’s BOR initiative. Second, the AIIB provides an institutional support for the BRI. The BOR initiative does not have a permanent institution of its own. Therefore, the BRI, with cooperation and coordination with the AIIB, can benefit from the institutional strength of the AIIB. Third, the AIIB can assist with risk prevention and reduction. If the AIIB is involved in BRI projects, it can use its policy instruments, for instance, risk management framework,²¹⁶ to reduce potential project risks. Furthermore, the involvement of the AIIB, an international organization, may discourage a BRI country from violating its obligations under BRI projects. Thus, the AIIB can reduce the business and political risks of China in carrying out the BRI. Fourth, the AIIB provides resource pooling. In addition to mobilizing resources from AIIB members, the AIIB encourages the participation of private capital.²¹⁷ In other words, the AIIB can amplify the resources that China invests in the BRI.

Thirdly, China’s capability of managing international institutions can be significantly improved. In contrast with the SCO, which was initially established by several like-minded countries, the AIIB is a multilateral institution, and its members are diverse in terms of ideology, economy, political systems, and so on. Therefore, the successful handling of AIIB affairs can help China understand the institutional culture of international organization, improve the professionalism of Chinese officials, and so on. For instance, since the AIIB is headquartered in Beijing, Chinese are more likely to be recruited by the AIIB.²¹⁸ Obviously, this is a part of China’s capability building in international organizations.

²¹⁴ Jin Liqun, Making the AIIB a Really International Institution Is the Largest Achievement for China.

²¹⁵ “Jin Liqun delivered speech at 2015 China Development Forum.”

²¹⁶ “Risk Management Framework” available at <https://www.aiib.org/en/policies-strategies/framework-agreements/risk-management-framework.html> (last visited May 15, 2019).

²¹⁷ AIIB Agreement, art. 2(iii).

²¹⁸ China’s nationals currently account for 24 percent of AIIB staff. See Jin Liqun, Making the AIIB a Really International Institution Is the Largest Achievement for China.

3. Domestic Institutions

3.1 Political Expediency, Rule of Law, and Chinese Domestic Institutions in Foreign Relations

An appropriate evaluation of the international legal policies and practice of a state requires a proper understanding of how the domestic institutions of that state are organized and operate in the field of foreign relations. This issue, the debates of which has led to a separate scholarship of foreign relations law in the U.S.,²¹⁹ has been poorly debated in China.²²⁰

Political expediency has long played a prominent role in handling foreign relations of a state. Historically, the poorly developed rule of law at an international level was the major justification of political expediency in the field of foreign relations. Lock suggested that, since inter-state relations remained in the state of nature, “the Power of War and Peace, Leagues and alliances, and all the Transactions, with all Persons and Communities without the Commonwealth,” which Locke defined as *Federative*, was “much less capable to be directed by antecedent, standing, positive laws” than domestic affairs. In a word, the *Federative* was a “natural” power like that which “every Man naturally had before he entered into Society.”²²¹ Furthermore, political expediency often implies efficiency. In other words, political expediency makes the government more responsive to rapidly changing international relations and thus take actions as soon as possible to protect the state’s interests.

On the other hand, although it is too early to argue that foreign relations law has been “normalized” while the “exceptionalism” to some extent remains,²²² the rule of law has become a new source of legitimacy in the handling of foreign relations. This is majorly important because international law has significantly changed over the past several decades, and there is now concrete demand for respect for rule of law in foreign relations. In earlier times, international law focused on such issues as war and peace, territories, diplomatic privileges, and immunity, which have little to do with domestic governance. By contrast, contemporary international law, for instance, trade and investment treaties, continually intrudes into domestic jurisdiction, and this has extensive implications

²¹⁹ See, e.g., Louis Henkin, *Foreign Affairs and the United States Constitution* (Oxford: Clarendon Press, 2nd ed., 1996).

²²⁰ See Congyan Cai, Chinese Foreign Relations Law, 111 *AJIL Unbound* 336 (2017).

²²¹ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 14th reprint, 2003) 366.

²²² See generally Ganesh Sitaraman and Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 *Harv. L. Rev.* 1899 (2015); Curtis A. Bradley, Foreign Relations Law and the Purported Shift from “Exceptionalism,” 128 *Harv. L. Rev. Forum* 294 (2015).

for individuals and public authority. In other words, international law has more and more bearing, positive or negative, on the national rule of law. As the rule of law at both the national level and the international level has been recognized in the abstract as a universal pursuit,²²³ it is more likely that political expediency is assumed to threaten the rule of law at the national level and the international level, which was actually implied by Locke.

Political expediency is of special significance for China. Political expediency was arguably helpful to rapidly expand China's power, especially economic power after China commenced the Reforming and Opening-up Policy in the late 1970s. More importantly, efficiency, which is often brought about by political expediency as suggested previously, is a major advantage of socialism. Deng Xiaoping said:

The greatest advantage of the socialist system is that when the central leadership makes a decision, it is promptly implemented without interference from any other quarters . . . We don't have to go through lengthy discussion and consultation, with one branch of government holding up another and decisions being made but not carried out. From this point of view, our system is very efficient . . . , and we should keep it—we should retain the advantages of the socialist system.²²⁴

In light of the “Chinese characteristics” of domestic governance discussed later, it is particularly necessary to discuss the role of Chinese institutions in foreign relations. For this purpose, I distinguish public institutions and private institutions because, in addition to public institutions, private institutions are of particular significance for Chinese international legal policies and practice. Then, I do not discuss Chinese domestic institutions one by one. Rather, they are examined from the perspective of mechanism, namely, I examine the interactions between public institutions and the interactions between public institutions and private institutions, respectively.

3.2 Public-Public Mechanisms

3.2.1 Past, Present, and Future

International law generally leaves it to a state to decide how its domestic institutions are organized. A long-standing tradition is that public institutions

²²³ 2005 World Summit Outcome, A/RES/60/1, October 24, 2005, paras. 11, 21, 134.

²²⁴ *Selected Works of Deng Xiaoping (Vol. 3)* (Beijing: Foreign Language Press, 1993) 187–188.

handle domestic affairs in a manner distinct from that in the foreign relations. The public-public mechanism refers to how the legislative, executive, and judicial branches interact with each other in the field of foreign affairs. According to Locke, both the legislative and the executive branches are major public institutions that exercise public authority over domestic affairs: the former makes laws, while the latter enforces enacted laws. Furthermore, since law is made “in a little time,” there is no need that the legislative branch “should be always in being”; by contrast, the law once made is constantly enforced, therefore the executive should be perpetual.²²⁵ However, the *Federative* should not be vested to the legislative branch; instead, it should be left to the executive branch, “the Prudence and Wisdom of those hands it is in, to be managed for the public good.”²²⁶ In other words, foreign relations fall within the domain of the executive branch, while the legislative branch is marginalized therein. Locke did not mention the role of the judiciary in foreign relations. The reason is simple: since inter-state relations were considered to take place in the state of nature, domestic courts could not and should not exercise judicial authority. In practice, domestic courts on most occasions defer to executive authority in foreign relations.²²⁷

However, Locke’s theory was not fully accepted in practice in countries. Public institutions bodies other than the executive branch, especially legislative branch, often intervene in foreign relations in one way or another. Those interventions are often conducted on a case-by-case basis, thereby leading to fragmental interactions between public institutions. According to Henkin, the conduct of foreign relations in the U.S. became the main part of the “twilight zone” where the distribution of power between the president and Congress leads to the “most intractable” issues of constitutional law.²²⁸ Similarly, F. A. Mann, in the investigation on English courts’ role in foreign affairs, also found that the law in this regard displayed “much confusion of thought and lack of precision.”²²⁹

There has been a trend since the 1990s where legislative and judicial branches in many countries steadily increase intervention in foreign relations, encroaching on the traditional domain of the executive branch. Parliaments have had larger say in treaty-making: more treaties are required to submit to

²²⁵ John Locke, at 364–365.

²²⁶ *Id.*, at 365, 366. Locke further pointed out that the executive power and *Federative* power were “really distinct in themselves,” but they were “hardly separated.” *Id.*, at 366.

²²⁷ Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990) 69–70 (hereinafter “Louis Henkin (1990)”); Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law, 4 *Eur. J. Int’l L.* 159 (1993).

²²⁸ Louis Henkin (1990), at 2.

²²⁹ F. A. Mann, *Foreign Affairs in English Courts* (London: Clarendon Press, 1986) vi.

parliaments for ratification or, at least, for attention; more time is given and more procedures are created to ensure meaningful parliamentary participations in treaty-making.²³⁰ Furthermore, domestic judges also seek to highlight their presence in foreign affairs by applying international law.²³¹

A similar trend has also emerged in China. However, those who do not have a proper understanding of China's unique constitutional framework cannot fully understand how public institutions interact with each other in Chinese foreign relations and what implications those interactions have on the rise of China.

The divergences between China's constitutional framework and that of Western states like the U.S. have been often emphasized by Chinese leaders. For instance, Deng Xiaoping said:

The democracy in capitalist societies is . . . no more than a system of multiparty elections, separation of judicial, executive and legislative powers and a bicameral legislature. Ours is the system of the people's congresses and people's democracy under the leadership of the Communist Party; we cannot adopt the practice of the West.²³²

A similar explanation was more recently presented by Wu Banguo, a former chairman of the Standing Committee of the NPC (NPSC). Wu said:

We should fully recognize that the relationship between that People's Congress on the one hand and the People's Government, the People's Court and the People's Procuratorate on the other hand is in nature different from that in Western countries. In China, the state power is invested to the People's Congress. The People's Government, the People's Court and the People's Procuratorate are created by, responsible for, and supervised by, the People's Congress. State organs with different authorities are under the leadership of the CCP and implement the CCP's policies and the Constitution and the laws . . . are not the checks and balances in Western countries.²³³

²³⁰ See generally Joanna Harrington, *The Role for Parliament in Enhancing the Transparency and Democratic Accountability of Canada Treaty-Making*, in *Canadian Council on International Law, Fragmentation: Diversification and Expansion of International Law*, 2005, at 273–311.

²³¹ Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of their State,"* 5 *Eur. J. Int'l L.* (1994) 423–439; Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *Am. J. Int'l L.* 241 (2008); Eyal Benvenisti and George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 *Eur. J. Int'l L.* 59 (2009).

²³² *Selected Works of Deng Xiaoping* (Vol. 3), at 187.

²³³ "Wu Banguo: We absolutely do not copy the multi-party system and checks and balanced practice in the Western countries," available at <http://news.sina.com.cn/c/2009-03-10/060115283341s.shtml> (last visited May 10, 2019).

Under China's constitution, the CCP is the sole ruling party, even though the CCP itself, in accordance with China's constitution, is not explicitly vested any specific legal authority.²³⁴ All public institutions are required to be organized and coordinated with the aim to implement policies decided by the CCP. Through its Party Committees, the CCP controls all legislative, executive, and judicial branches because almost all of their leaders simultaneously are CCP members. As a result, the CCP's influence and control "is ubiquitous; it penetrates every aspect of society," therefore "there is no such thing as government policy independent from the CCP."²³⁵ It thus is said that the CCP plays a prominent role in Chinese international legal practice.

In the following section is an illustration on the interactions among public institutions in the treaty-making.

3.2.2 Treaty-Making Mechanism

3.2.2.1 *Law on the Book*

In accordance with the Constitution (1954), the NPC is authorized to "decide on the ratification or abrogation of treaties" (Article 31(12)); the president ratifies these treaties "in accordance with decisions" of the NPCSC (Article 41); the State Council is responsible for handling "the external affairs" (Article 49(13)), including the negotiation and conclusion of treaties.

Several points in the treaty provision of the Constitution (1954) are worth mentioning. Firstly, the NPC has authority to decide on treaties concerning "war and peace" (Article 27(12)),²³⁶ but it has no power to decide on treaties in peacetime, which obviously account for most treaties that any state negotiates. The sole body that is explicitly empowered to make decisions on the ratification of treaties concluded in the peacetime is the NPCSC, a permanent organ of the NPC comprising limited members elected by the NPC (Article 30).²³⁷ The major reason is that, since the NPC generally has one session a year,²³⁸ it is not practical for it to make timely decisions on many treaties. However, such a distribution of treaty power derogates the supremacy the NPC as the supreme legislature.²³⁹ Secondly, the Constitution (1954) does not clarify the scope of "treaties" to be ratified by the NPCSC. Thus, it can be inferred that

²³⁴ China's Constitution (1982, as last amended in 2012), Preamble.

²³⁵ Zhu Suli, Political Parties in China's Judiciary, 17 *Duke J. Comp. & Int'l L.* 533 (2006–2007) 535, 538.

²³⁶ See also Constitution (1982, as amended in 2004), art. 62(14).

²³⁷ The composition of the Standing Committee changed over time. In early times, it comprised less than 100 members. The Standing Committee of the 12th (March 2013–March 2018) NPC has 170 members. See http://www.npc.gov.cn/npc/cwhhy/12jcw/node_32854.htm.

²³⁸ Constitution (1982), art. 61.

²³⁹ Xinsheng Xie, Procedure and Power of Treaty-Concluding in China, 1 (2012) *J. East China U. Pol. Sci. & L.* 46 (2012) 53 (in Chinese).

any instruments creating international legal rights and obligations must be submitted to the NPCSC for decisions. Thirdly, the president must ratify a treaty in accordance with prior decisions by the NPCSC. However, the president has the power to neither conclude nor ratify treaties without prior decisions from the NPCSC. Finally, the State Council is responsible for negotiating and concluding treaties, but it cannot put them into effect in the domestic legal order without prior acts by the NPCSC and the president. Thus, the treaty ratification *de facto* is the exclusive domain of the NPCSC.

That power distribution on treaty-making changed soon after its creation. Less than one month after the adoption of the Constitution (1954), the NPCSC passed a decision (Decision (1954)).²⁴⁰ That decision substantially amended the treaty ratification provisions of the Constitution (1954). According to that decision, the ratification of “treaties” (including “agreements”) of “peace, mutual non-infringement, friendship, alliance and mutual assistance” and those explicitly requiring domestic ratification were required to be handled in accordance with Articles 31 (12) and 41 of the Constitution (1954). Since that list of “important” treaties is exhaustive, it eliminated any ambiguity in the distribution of power between the NPCSC and the State Council in treaty ratification. On the other hand, those not falling within the aforesaid “treaties,” which accounted for most of Chinese treaties, would be directly “approved” [he zhun] by the State Council. Clearly, the Decision (1954) significantly reduced the treaty power of the NPCSC, putting the State Council at the center of treaty power. The Decision (1954) was repealed in 1987.

Largely speaking, the Constitution (1982) maintains the approach established in the Decision (1954). For instance, like the Constitution (1954), the Constitution (1982) requires that the president ratify treaties in accordance with decisions of the NPCSC (Article 81) and remains silent on the treaty power of the NPC in peacetime. Furthermore, the Constitution (1982) stipulates that the NPCSC decides on the ratification of “treaties and important agreements” (Article 67(14)) while others are left to the State Council for consideration. However, the phrase “treaties and important agreements” is not defined, which confuses many people. Theoretically speaking, all instruments titled as “treaty” must be submitted to the NPCSC for ratification. In accordance with Article 67(14), however, only those “agreements” which are considered “important” need to be submitted to the NPCSC for ratification. As a matter of fact, however, the approach of differentiating “treaty” from “agreement” was squarely rejected by the ILC of the UN, which considered such an approach

²⁴⁰ The NPC’s Standing Committee, Decision on the Ratification Procedure on Concluding Treaties with Foreign States, October 16, 1954. This decision was repealed on November 24, 1987.

“inelegant.”²⁴¹ According to the ILC, therefore, the phrase of “treaties and important agreements” in China’s Constitution (1982) should have been drafted as “important treaties.” Importantly, the Constitution (1982) does not define the meaning of “important,” which makes “important” treaties open-ended. Obviously, the scope of “important” treaties referred to in the Constitution (1982) is far larger than those referred to in the Decision (1954). Thus, the NPCSC significantly regained the treaty power which was largely encroached in the Decision (1954). Theoretically, there is a risk that the NPCSC, through liberally interpreting the word “important,” may seek to seize treaty power as much as possible.

Since the Decision (1954) ceased to apply in 1987, the State Council found it necessary to enact a new law to prescribe procedures for concluding treaties. On December 28, 1990, the NPCSC approved the Law of the People’s Republic of China on the Procedures for the Conclusion of Treaties (Treaty-Concluding Procedure Law (1990)). This new law incorporates some elements of the VCLT and draws on the legal practice of some other states.²⁴² It should be stressed that new law was intended to “contribute to the opening-up and to increase working efficiency.”²⁴³

Article 3 of the Treaty-Concluding Procedure Law (1990) consolidates, without any change in substance, treaty provisions regarding the treaty power of the NPCSC, the president, and the State Council, respectively, under the Constitution (1982).²⁴⁴ According to that law, China concludes treaties and agreements with other countries in the name of (1) the PRC; (2) the government of the PRC; and (3) the governmental departments of the PRC (Article 4). The negotiation and conclusion of treaties and agreements in the name of the PRC or the government of the PRC shall be decided by the State Council with an exception.²⁴⁵ On the other hand, those treaties in the name of governmental

²⁴¹ Oliver Dörr and Kirsten Schmalenhach eds., *Vienna Convention on the Law of Treaties* (Springer, 2012) 29. See also VCLT, art. 2(1)(a).

²⁴² Qian Jicheng, Explanations Concerning the Law of the People’s Republic of China on the Procedures for the Conclusion of Treaties, presented before 15th Session of the Standing Committee of the 7th NPC (August 30, 1990), available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/27/content_5002493.htm.

²⁴³ *Id.*

²⁴⁴ Article 3 provides: “The State Council, that is, the Central People’s Government, of the People’s Republic of China shall conclude treaties and agreements with foreign states. The Standing Committee of the National People’s Congress of the People’s Republic of China shall decide on the ratification and abrogation of treaties and important agreements concluded with foreign states. The President of the People’s Republic of China shall, in accordance with decisions of the Standing Committee of the National People’s Congress, ratify and abrogate treaties and important agreements concluded with foreign states. . . .”

²⁴⁵ Article 5(1)(2) of Treaty-Concluding Procedure Law (1990) provides that, in case that an agreement concerns “a specific line of business,” the draft in Chinese, “with the consent of the State Council,” should could be “examined and decided upon by the department concerned under the State Council or when necessary in consultation with the Ministry of Foreign Affairs.”

departments of the PRC shall be decided by the ministry-level departments. However, an exception exists: in the case of an “agreement” relating to “matters of major importance or matters falling within the functions and powers of other departments under the State Council,” the department concerned is required to submit that agreement to the State Council for decision (Article 5).

Treaty-Concluding Procedure Law (1990) retains the phrase “treaties and important agreements” intact, thereby failing to remedy the defect noted above. However, this law, in Article 7, Paragraph 2, does seek to clarify the scope of “treaties and important agreements” by providing an illustrative list. Under Paragraph 2, those “treaties and important agreements” the ratification of which shall require approval by the NPCSC include six groups: (1) treaties of friendship and cooperation, treaties of peace, and similar treaties of a political nature; (2) treaties and agreements relating to territory, and delimitation of boundary lines; (3) treaties and agreements relating to judicial assistance and extradition; (4) *treaties and agreements that contain stipulations inconsistent with the laws of the PRC* (italics added); (5) treaties and agreements that are subject to ratification as agreed by the contracting parties; and (6) other treaties and agreements subject to ratification. Paragraph 3 further provides that, after the signing of a “treaty” or an “important agreement,” the MFA or the department concerned under the State Council in conjunction with the MFA shall submit it to the State Council for “examination and verification”; the State Council shall then “refer” it to the NPCSC for decision. Moreover, those agreements not falling under Paragraph 2 either shall be submitted, separately or jointly, by the MFA to the State Council for “approval” (Article 8, Paragraph 1), or, after their signing by the relevant department under the State Council, shall be submitted by that department to the State Council for “record” or to the MFA for “registration” (Article 9). In other words, the executive branch need not submit all nonimportant agreements to the NPCSC for “record.”²⁴⁶

From the perspective of the actual operation of the mechanism between the legislative branch and the executive branch, the fourth group of treaties merits special attention. Some Chinese international lawyers argue the “laws” [fa lü] mentioned in the fourth group refer to any laws promulgated by the NPCSC.²⁴⁷ Thus, the requirement that any treaties and agreements containing provisions inconsistent with the “laws” shall be submitted by the State Council to the NPCSC is abided by.

An important issue is raised again: What is the role of the NPC in the ratification of treaties concluded in peacetime? The Constitution (1982) remains silent

²⁴⁶ Xie Xinsheng, at 48–49.

²⁴⁷ See, e.g., *id.*, at 51.

in this regard. Although the NPC can normally adopt a decision based on its residual constitutional power,²⁴⁸ the Treaty-Concluding Procedure Law (1990), in Article 7, precludes this option by exclusively empowering the NPCSC to decide the ratification of treaties. Theoretically, the State Council need not and should not seek a decision from the NPC. However, this is constitutionally unfounded. That is, the NPCSC might transgress the legislative power of the NPC in deciding the ratification of treaties.²⁴⁹ This is because the relevant treaties, the ratification of which is decided by the NPCSC, might contain provisions inconsistent with the laws of China and which can be only enacted by the NPC. Under the Legislation Law (2000), the NPC “enacts and amends criminal, civil, and state organic laws and other *basic laws* (italics added);”²⁵⁰ the NPCSC “enacts and amends laws other than those to be enacted by” the NPC and “partially amends and supplements laws” enacted by the NPC but it “is not in session.”²⁵¹ Namely, the legislative power of the NPCSC should be subject to the limitations of the NPC. Unfortunately, the NPC, in accordance with the Treaty-Concluding Procedure Law (1990) cannot adopt a decision on the treaty ratification.

China has announced plans to improve treaty-making procedures. In March 2017, the State Council published the Regulation (Draft) for the Implementation of the Treaty Procedure Law (Treaty-Concluding Procedure Regulation (Draft)) for public comments. According to the State Council, the Regulation (Draft) is aimed to make the Treaty Procedure Law (1990) “more tailored, practical and operational.”²⁵² This appears to indicate an encouraging trend that China is seeking to improve the rule of law in foreign relations.

Treaty-Concluding Procedure Regulation (Draft) expands significantly the illustrative list of treaties which should be submitted to the NPCSC for decisions

²⁴⁸ Article 62(15) of the Constitution (1982) provides that the NPC could exercise “such other functions and powers as the highest organ of state power should exercise.”

²⁴⁹ Xie Xinsheng, at 51; Zhang Naigeng, at 17–18.

²⁵⁰ The legislation shall be conducted in the name of “laws” [fa lü] toward the following subject matter: (1) state sovereignty; (2) the establishment, organization, and authority of various people’s congresses, people’s governments, people’s courts, and people’s procuratorates; (3) autonomy system of ethnic regions, system of special administrative region, and system of autonomy at the grass-roots level; (4) crimes and criminal sanctions; (5) the deprivation of the political rights of a citizen, or compulsory measures and penalties involving restriction of personal freedom; (6) expropriation of non-state assets; (7) fundamental economic system and basic fiscal, tax, customs, financial, and foreign trade systems; (8) litigation and arbitration system; (9) litigation and arbitration system; (10) other matters the regulation of which must be carried out through enactment of national law by the NPC or its Standing Committee. Legislation Law (2000, as amended in 2015), art. 8.

²⁵¹ Legislation Law (2000, as amended in 2015), art. 7.

²⁵² “Note by the Legal Affairs Office Concerning Seeking Public Comments on the Implementation of the Law of the People’s Republic of China on the Procedures for the Conclusion of Treaties,” available at http://www.gov.cn/xinwen/2017-03/16/content_5177941.htm (last visited December 10, 2018).

on ratification by specifying particular treaties²⁵³ and including treaties with “significant impacts on China’s national interests in diplomacy, economy and security.”²⁵⁴ Furthermore, it provides that, upon submitting a treaty to the NPCSC, the State Council shall provide a motion accompanied by an explanation. The motion shall include, *inter alia*, information concerning the time of adoption, contracting parties, and so on; importance for China to decide on the ratification or accession; result of examination and verification of the State Council; and proposed declarations or reservations. The explanation shall include, *inter alia*, the background and negotiations of treaties; main content of treaties; necessity to ratify or join the treaties and the potential impact on China; priorities and difficulties in the course of negotiations; potential enactment or amendment of laws; and explanations on declarations or reservations to be made.²⁵⁵ Furthermore, that list seeks to reconcile the NPCSC’s treaty power with the legislative power. For instance, the treaties including the adjustment of taxation rate and criminal and sanctions, subject matter falling within the NPC and NPCSC’s legislative power, are added to that list.²⁵⁶

3.2.2.2 *Law in Action*

“Laws on the book” does not always match “law in action.” The treaty-making mechanism provided in the Treaty-Concluding Procedure Law (1990) is deviated in practice. This implies that political expediency often prevails over the rule of law in Chinese foreign relations.

The first deviation concerns the distribution of treaty power between the State Council and the NPCSC. Whether this treaty power is properly allocated between them depends on whether or not the word “important” in the phrase of “treaties and important agreements” is correctly interpreted. Theoretically, the NPCSC shall readdress any misinterpretation by the State Council on the meaning of “important,” but it has never done so in practice.²⁵⁷ It is safe to argue that the State Council often misinterprets the meaning of the word “important.” A telling case is the conclusion of taxation agreements. The State Council has never submitted those agreements to the NPCSC for consideration

²⁵³ For instances, treaties that would require the adjustment of budget of central government; treaties relating to the adjustment of the taxation rate prescribed in laws; treaties relating to the basic civil legal regimes, crime and penalty, litigation, and arbitration; treaties relating to the accession to important international organizations in the political, economic, and security fields. Treaty-Concluding Procedure Regulation (Draft), art. 17(5)–(8).

²⁵⁴ Treaty-Concluding Procedure Regulation (Draft), art. 17(9).

²⁵⁵ Treaty-Concluding Procedure Regulation (Draft), arts. 24 and 25.

²⁵⁶ Compare art. 17(6) and (7) of Treaty-Concluding Procedure Regulation (Draft) with art. 8(4) and (6) of Legislation Law (2000).

²⁵⁷ Chen Yifeng, The Treaty-Making Power in China: Constitutionalization, Progress and Problems, 15 *Asian Y.B. Int’l L.* 43, 51 (2009).

of ratification. However, taxation agreements are arguably “important” agreements in that (1) taxation is generally considered to be within the domain of the parliament in nearly all countries—in other words, the subject matter is fundamentally important; (2) the established international practice is that taxation agreements are ratified by parliaments in most other states; and (3) taxation agreements perhaps contain provisions inconsistent with Chinese taxation laws.²⁵⁸ As noted previously, however, taxation agreements, in accordance with the Treaty-Concluding Procedure Regulation (Draft) (2017), must be submitted to the NPCSCC for decisions on ratification. Similarly, the Treaty-Concluding Procedure Regulation (Draft) (2017) requires that the NPCSC shall decide on the ratification of investment treaties, which, like taxation agreements, have never been submitted to the NPCSC.

The ratification of the Protocol on China’s WTO accession merits special attention. On August 25, 2000, the NPCSC adopted a decision after hearing a report on the negotiation of China’s WTO accession submitted by the MOC of China. The NPCSC decided that it

approves that State Council finishes negotiations on the accession to the WTO in accordance with the aforesaid principles and the Protocol on China’s accession to the WTO to be signed by China’s appointed representative, which, after the ratification by the President, fulfills the procedure of China’s accession to the WTO.²⁵⁹

However, it was not until November 9, 2001, more than one year after it was adopted and one day before the WTO Ministerial Conference adopted the Protocol of China’s WTO accession on November 10, 2001, that that decision was released. More importantly, China’s representative signed the Protocol on November 11 and simultaneously submitted to the WTO the instrument of ratification which was previously signed by China’s president on November 1!

Some Chinese international lawyers were aware that in the handling of China’s WTO accession NPCSC was inconsistent with China’s constitution. For instance, Zhang Naigeng argued that the decision of the NPCSC

is like a decision which authorizes and signs the Protocol rather than a decision to ratify the Protocol in accordance with constitutional procedure.

²⁵⁸ Yongwei Liu, Important Agreements and Unimportant Agreements: Also Commenting on the Importance of Sino-Foreign Taxation Agreements, 4 (2008) *Pol. & L. Forum* 171 (2008) 176 (in Chinese).

²⁵⁹ “The decision of the NPCSC concerning China’s accession to the WTO”, available at http://www.npc.gov.cn/wxzl/wxzl/2001-12/06/content_280847.htm (last visited May 20, 2019).

According to constitutional provisions, however, the NPCSC neither has power to ratify treaties and important agreements in advance, nor has power to authorize the State Council to negotiate and sign treaties and important agreements . . . Therefore, my conclusion is: the decision made by the NPCSC is unconstitutional.²⁶⁰

In Zhang's opinion, the handling of China's WTO accession was also illegitimate. He argued that

as the NPCSC, let alone the NPC, had no opportunity at all to review in detail the Protocol (until 45 days after China was formally admitted to the WTO, Chinese version of the Protocol was released by government. Thus, how could they review it?), some provisions which are very negative to China's political and economic interests had not been reviewed by the highest legislature . . . Some people proposed that China, under very difficult circumstances, could not do but make political decisions or compromises with the aim to finish over one decade of arduous negotiations with many uncertainties, and to maximize interests arising from China's accession to the WTO. Constitutional authority would not exist any longer if international political bargains of this kind would be invoked to explain the "reasonableness" of unconstitutionality. "Rule by law" prescribed in Article 3 of Constitutional Amendment of 1999 would merely be some empty words. . . . At the same time, as far as the strategy for international negotiations is concerned, Chinese negotiators could not use the final review by the highest legislature as a bargaining chip on the negotiation table while Chinese negotiating counterparts thus knew Chinese cards well, who again and again imposed huge pressure on Chinese negotiators.²⁶¹

The second deviation involves the NPC. As noted previously, the NPC, in accordance with the Treaty-Concluding Procedure Law (1990), is excluded from the ratification of treaties concluded in peacetime, even though the subject matters of the relevant treaties may fall within its constitutional power. In practice, however, the NPC has occasionally exercised this treaty power. The first occasion is the Sino-British Joint Declaration on Hong Kong (1984). The NPC has the exclusive constitutional power to decide on "the establishment of special administrative regions and the systems to be instituted there."²⁶² Thus, the NPCSC would have infringed upon the NPC's power if it decided on the ratification of the Joint Declaration. The State Council eventually submitted the Joint

²⁶⁰ Zhang Naigeng, at 18.

²⁶¹ *Id.*

²⁶² Constitution (1982), art. 62(13).

Declaration to the NPC, and the NPC adopted a decision on ratification.²⁶³ The second occasion is China-Portugal Joint Declaration on the Question of Macao (1987). This time, the State Council submitted the Joint Declaration to the NPC for consideration shortly after that Joint Declaration was initialed by China's foreign minister. The NPC adopted a resolution, authorizing the NPCSC to review and ratify that document.²⁶⁴ These two cases represent different approaches dealing with the discrepancy of legislative power and treaty power of the NPC: ratify a treaty on its own or grant a prior authorization to the NPCSC.²⁶⁵ Obviously, both approaches are based upon the legislative power instead of the treaty power of the NPC.

The third deviation concerns the presidency. The power of the head of a state to conclude a treaty has been well established under customary international law.²⁶⁶ As noted previously, however, China's president, in accordance with the Constitution (1982) and the Treaty-Concluding Procedure Law (1990), has no power to conclude a treaty. In practice, however, China's president occasionally signed treaties. For instance, on January 15, 2007, then President Hu Jintao signed the Treaty of Good Neighborliness, Friendship and Cooperation between China and Tajikistan. Again, on August 15, 2007, President Hu signed the Treaty of Long-Term Good-Neighborliness, Friendship and Cooperation between the member states of the Shanghai Cooperation Organization.

3.2.3 Mechanisms for Chinese Courts' Engagement with International Law

The ways in which Chinese courts apply international law will be discussed in the next chapter. Here I would like to examine two mechanisms for Chinese courts' engagement with international law: horizontal and vertical.

The concept of the horizontal mechanism concerns how the judicial branch and the executive branch interact with each other. Such a mechanism has long been established in the U.S. Through submitting an *amicus curiae* brief or the Statement of Interest (SOI), and so on,²⁶⁷ the executive branch in the U.S., if it deems necessary, intervenes in a court proceeding with implications

²⁶³ The Decision of the 3rd Meeting of the 6th National People's Congress on ratifying the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, April 10, 1985.

²⁶⁴ The Decision of the 5th Meeting of the 6th National People's Congress on reviewing and ratifying the Joint Declaration of the Government of the Republic of Portugal and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, April 11, 1987.

²⁶⁵ Chen Yifeng, at 64.

²⁶⁶ VCLT, art. 7(2)(a).

²⁶⁷ See Beth Stephens, Judicial Deference and the Unreasonable Views of the Bush Administration, 33 *Brook. J. Int'l L.* 773 (2007–2008) 773–774; Catherine Henson Curlet, Should a Statement of Interest Matter?: Judging Executive Branch Foreign Policy Concerns, 44 *Ga. L. Rev.* 1063 (2009–2010).

for foreign relations. In China, the Rules Concerning the Resolution of Some Issues of Foreign-Related Cases, which was jointly issued by the SPC and several governmental departments (including the MFA) in 1995,²⁶⁸ creates such a mechanism. Under this system, Chinese courts, in deciding some foreign-related cases, shall inform and solicit views especially from the MFA at the central governmental level and from foreign affairs authorities at local levels. According to the Rules, in dealing with foreign-related cases concerning the violation of international treaties and claims against foreign governments, and so on, Chinese courts and executive branch shall “closely cooperate and coordinate with each other, fully abide by requirements of reporting, seeking opinions and inform each other the progress of handling cases, etc.”²⁶⁹ For instance, within forty-eight hours after the relevant legal actions are taken, a lower-level court, in addition to reporting to a higher-level court, shall communicate with the relevant foreign affairs authorities.²⁷⁰ However, the Rules do not specify detailed procedures. Furthermore, these arrangements are informal. Foreign relations authorities like the MFA hold coordination meetings with the courts and document minutes. These minutes, which arguably have the similar function of *amicus curiae* brief or the SOI in the U.S., are not accessible to disputing parties and the public. Although there is nothing in the Rules providing how Chinese courts treat opinions of the executive branch,²⁷¹ it is safe to believe, in light of the predominance of the executive branch in China’s national governance, that Chinese judges defer to the executive branch on nearly all—if not all—occasions.

Vertical mechanisms mainly include Judicial Interpretation and Guiding Cases established by the SPC. The SPC, through these mechanisms, ensures that international law is properly applied in the lower courts.

In a Judicial Interpretation issued in August 1995, for instance, the SPC established the Reporting and Reviewing (R2) system to guide and supervise the application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention (1958)) by local courts. Thus, a local court shall report to a high court for examination if it will preliminarily decide not to recognize and enforce a foreign arbitral award which it considers inconsistent with a treaty which China has entered into; if the high court

²⁶⁸ Ministry of Foreign Affairs (MFA), Chinese Ministry of Public Security (MPS), Ministry of State Security (MSS), Ministry of Justice (MOJ), Supreme People’s Court (SPC), and Supreme People’s Procuratorate (SPP), Rules Concerning the Resolution of Some Issues of Foreign-Related Cases, June 20, 1995.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Domestic courts often defer to the executive branch, *see generally* Eyal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by Domestic Courts, 102 *Am. J. Int’l L.* 241 (2008) 245.

confirms that preliminary decision, it shall report to the SPC for further confirmation. Otherwise, that local court is not allowed to make the final decision of not recognizing and enforcing any foreign arbitral awards.²⁷² According to a SPC judge, the R2 mechanism effectively remedies the errors of local courts in their application of the New York Convention (1958).²⁷³

In November 2010, “in order to sum up judicial practice, keep the consistency of legal application, improve judicial quality and protect judicial integrity,” the SPC issued Rules Concerning the Guiding Cases.²⁷⁴ The SPC, after an evaluation in accordance with criteria that it has established,²⁷⁵ decides which cases are selected as “Guiding Cases.” Chinese courts, in deciding cases with similar facts, shall “refer to” the relevant “Guiding Cases.”²⁷⁶ Since China is a civil law country, the “Guiding Cases” system cannot constitute a precedent like that in a common law country. As a matter of fact, it remains disputed what exactly is the legal nature of the “reference.”²⁷⁷ Furthermore, to date there has only been one “guiding case” concerning the application of the international law.²⁷⁸ However, the important thing is that the SPC endeavors to improve the consistency of applying international law.

3.3 Public-Private Mechanisms

A public-private perspective is of special significance for China’s government to devise international legal policies, and for observers to understand Chinese international legal policies and practice in that private entities arguably have attained such an importance in the rise of China that has never existed in the rise and fall of traditional great powers.

Firstly, in contrast with the rise of traditional great powers, China is rising in an era in which private entities play a key role in international relations,²⁷⁹ one

²⁷² Supreme People’s Court, Notice Concerning Issues Regarding Foreign-Related Arbitration and Foreign Arbitration by People’s Courts, August 28, 1995.

²⁷³ Honglei Yang, Report on the Judicial Review of Foreign Arbitration in the People’s Courts, 9 *Wuhan U. Int’l L. Rev.* 304 (2009) 311 (in Chinese).

²⁷⁴ Supreme People’s Court, Rules Concerning the Guiding Cases, November 26, 2010, available at http://www.law-lib.com/law/law_view.asp?id=342688.

²⁷⁵ “Guiding cases” refer to cases the judgments of which have taken effect, satisfying one of these criteria: (1) attract much public concern; (2) the applicable law is not clear and precise enough; (3) is typical; (4) are complicated to decide or are identified as a new kind of cases; (5) are of other guiding value. Rules Concerning the Guiding Cases, art. 2.

²⁷⁶ Rules Concerning the Guiding Cases, art. 7.

²⁷⁷ See, e.g., Weijiang Pan, On the Effect of Guiding Case, 1 *Tsinghua U. L.J.* 20 (2016) (in Chinese).

²⁷⁸ Thyssen Krupp Metallurgical Products GmbH v. Sinochem International (Overseas) Pte Ltd. (Appeal), Judgment of June 30, 2014.

²⁷⁹ See generally Rodney Bruce Hall and Thomas J. Biersteker eds., *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

that they have never had before in history. As a result, in addition to other sovereign states, China has to engage massive private entities at home and abroad. As far as the engagement with other sovereign states is concerned, China can draw lessons from the rise and fall of great powers in history. By contrast, there have not existed extensive systematic engagements between private entities and sovereign states before. Thus, China faces a new challenge which traditional great powers have not experienced.

Secondly, as illustrated in depth later, there is a unique public-private relationship in China which might not be found elsewhere. That public-private relationship prioritize collective value instead of individualist value on which the Western world is based. In other words, it is presumably suggested that the rise of China would threaten individualism. It seems that Anne Peters is seriously concerned with this risk. In light of the relative decline of the U.S. and European countries that have advocated individualism, Anne Peters raises a provoking question of “whether and how this power shift affects the international legal system, and with this, the status of the individual in it.” She warns that “a reversal of ‘individualization’ of international law would seem likely.”²⁸⁰

Thirdly, China’s population reached more than 1.4 billion in 2016, nearly twice the number of that of all G-7 countries.²⁸¹ This huge population has many implications for Chinese international legal policies and practices. For instance, given 730 million (the total of the populations of G-7) internet users in 2016,²⁸² it is understandable China has a huge state interest in international governance on cyberspace.²⁸³ Chinese internet companies arguably can act on their own or help China’s government to advocate for initiatives or proposals on cyberspace governance in favor of China. Similarly, as China becomes a new major source of international investment,²⁸⁴ Chinese investors, especially the SOEs, may bring about substantial implications for the international legal order on investment. As noted later,²⁸⁵ some new regulatory measures which clearly target Chinese investors have been taken or been under consideration at both national

²⁸⁰ Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016) 3.

²⁸¹ “Populations of states in 2016,” available at http://www.sohu.com/a/121133597_350221 (last visited June 1, 2017).

²⁸² China Internet Network Information Center (CNNIC), Chinese Statistical Report on Internet Development, January 2017, at 33.

²⁸³ See Cyberspace Administration of China, National Strategy on Cyberspace Security (December 2016), available at http://www.cac.gov.cn/2016-12/27/c_1120195926.htm; International Cooperation Strategy on Cyberspace (March 2017), available at http://news.xinhuanet.com/2017-03/01/c_1120552767.htm (last visited June 1, 2017).

²⁸⁴ See UNCTAD, World Investment Report 2017: Investment and Digital Economy, at 8, 54, 67, 68, 76, 84. See also Mitchell Silk and Richard Malish, Are Chinese Companies Taking over the World?, 7 *Chi. J. Int’l L.* 105 (2006–2007).

²⁸⁵ See Section 3.3.2.

level and international level, for instance, Chapter 17 (state-owned enterprises and designated monopolies) of the Trans-Pacific Partnership (TPP), or the national security review system in some countries.

3.3.1. Public-Private Relationship in China

As suggested previously, the public-private relationship in China is unique, highly stressing the collective value instead of individualist value. It is suggested that this unique public-private relationship is instrumental in enhancing the rise of China, which currently characterizes the rise of “Chinese people” rather than “Chinese individuals.”

The Chinese unique public-private relationship is rooted in Chinese civilization and socialist ideology. In brief, Confucianism-Legalism and socialism have many similarities regarding the public-private relationship. It is the combination of socialism with Confucianism-Legalism that creates a unique and enduring public-private relationship in China. It is difficult to understand Chinese international legal policies and practices without a proper understanding of public-private relationship in China.

3.3.1.1 *Public-Private Relationship in Chinese Civilization*

Confucianism, Legalism, Daoism, Mohism, and the Yangzhu School are major schools in Chinese traditional civilization. They all have different thinking on the public-private relationship. Daoism, Mohism, and the Yangzhu Schools attached much importance to human dignity, equality, and freedom,²⁸⁶ but they were not accepted by Chinese emperors. In contrast, Confucianism and Legalism, which stress hierarchy and collectivism, were accepted as orthodox thoughts in the Chinese empire. Actually, the Chinese empire was considered a “Confucian-Legalist State.”²⁸⁷

For instance, Confucianism advocated the famous “Three Cardinal Guides” [san gang], namely: “ruler guides subject, father guides son and husband guides wife.”²⁸⁸ Legalism strongly supported the notion that the state should be organized “under a centralized bureaucracy that tightly controlled its population.”²⁸⁹ To summarize, Chinese traditional public-private relationship is collectivism-oriented and obligation-oriented, attaching little importance to individualist value.

²⁸⁶ See Qianfan Zhang, *Human Dignity in Classical Chinese Philosophy* (New York: Palgrave, 2016) Chapters 5 and 6.

²⁸⁷ See generally Dingxin Zhao, *The Confucian-Legalist State: A New Theory of Chinese History* (Oxford: Oxford University Press, 2015).

²⁸⁸ Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law* (Zhang Lixin and others translated, Berlin: Springer, 2014) 80

²⁸⁹ Dingxin Zhao, at 263.

Such a understanding of the public-private relationship has profound implications for Chinese national governance. Xingzhong Yu contends that Confucianism and Legalism prevent “the differentiation between the public and private spheres,” which virtually leaves “no space for the distinction between public law and private law to grow.”²⁹⁰ Ann Kent also considers Chinese society “as an organic whole whose collective rights prevailed over the individuals, the idea that man exists for the state rather than vice versa.”²⁹¹ Actually, the word “private” in China often is assumed to imply “selfishness.”²⁹²

Since the late eighteenth century, however, many people have recognized that the traditional public-private relationship was notoriously flawed and thus should be radically reshaped. For instance, Zheng Guanying (1842–1922), a great theorist, argued that “[h]uman rights are to man what water is to fish, air to birds and beasts, and soil to plants. Therefore, as for an individual, to protect his rights from being infringed is to protect ‘Tian’ (heaven) . . . The failure of protecting the individuals’ rights means to discard ‘Tian’ (heaven).”²⁹³ Another two great theorists and statesmen, Kang Youwei and Tan Sitong, fiercely attacked the “Three Cardinal Guides” [san gang] by introducing the Western theory of natural rights. For instance, Kang Youwei argued, “Since everyone is created by ‘Tian’ (heaven) . . . , so everyone shall be independent and equal.”²⁹⁴ Those reformists encouraged many Chinese people to embrace and pursue individualism in the early twentieth century, but unfortunately, individualism did not make a perceivable difference in Chinese national governance largely because the socialist ideology, which also stressed the collective value, was established as the orthodox philosophy in China as the PRC was founded in 1949.

3.3.1.2 *Public-Private Relationship in Chinese Socialist Ideology*

Initially, “socialism” referred to the ideology aimed at improving society through collective and egalitarian action.²⁹⁵ The classical socialist theory suggests that “the total good is better than the good of the individual. The individual, in other words, has, in the main, value in himself but only to the extent that he is part of the whole.”²⁹⁶ According to the radical socialists, private rights

²⁹⁰ Xingzhong Yu, *State Legalism and the Public/Private Divide in China*, 15 *Theoretical Inquiries in Law* 27 (2014) 32–33.

²⁹¹ Ann Kent, *Between Freedom and Subsistence: China and Human Rights* (Oxford: Oxford University Press, 1993) 30–31.

²⁹² Xingzhong Yu, at 40.

²⁹³ Citing from Jinfang Zhang, at 538.

²⁹⁴ Citing from *id.*, at 539–540.

²⁹⁵ Mo Zhang, *From Public to Private: Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 *Berkeley Bus. L.J.* 317 (2008) 325.

²⁹⁶ A. G. Chloros, *Common Law, Civil Law and Socialist Law: Three Leading Systems of the World*, 9 *Cambrian L. Rev.* 11 (1978) 22.

advocated by the bourgeois and rooted in the capitalism have no place in socialist societies. This is because “in such a community of social beings people will be united by bonds deeper than those of rights and sanctioned obligations; under socialism all will work together spontaneously in a willing spirit of co-operation unencumbered by restrictive regulations and in the absence of the self-interested competitiveness in which the language of rights is rooted.”²⁹⁷ Lenin once argued that “there is no longer any private law with us, everything has become public law.”²⁹⁸ In contrast, reformists suggest that bourgeois rights could be selectively maintained to develop “a distinctively socialist scheme of rights” through getting rid of some of them (for instance, private ownership and individual liberty) while introducing new rights (for instance, economic and social rights associated with a full-employment welfare-oriented society).²⁹⁹

It should be acknowledged, however, that the socialist public-private relationship has experienced transformations in China over the past several decades. In the era of Mao Zedong (1949–1976), China completely “socialized” the public-private relationship: both private property rights and civil and political rights were totally denied. That situation began to change after China started the Reforming and Opening-up Policy in the late 1970s. The Reforming and Opening-up Policy has reshaped the traditionally socialist public-private relationship in the economic field. A historic event in this respect was when China decided to build a “socialist market economy” in 1993.³⁰⁰ Accordingly, private property has been given better protection, as have other more liberal economic activities.³⁰¹ In particular, in March 2007, the NPC adopted the Property Law. According to the law, all property rights shall be equally protected, regardless of their owners, namely, state or private.³⁰² This is a breakthrough because in the past the state-owned property enjoyed far better protection than did private property.³⁰³ On the other hand, China has made less progress in civil and political rights. For instance, in the twenty years after China signed the ICCPR, China has not yet ratified it. Notwithstanding, it is believed that the collective value continues to be vested with more importance in socialist China than it in most other countries. It thus comes as no surprise that there are recurring debates concerning the role of private economy in China.³⁰⁴ Furthermore, as

²⁹⁷ T. D. Campbell, *The Socialist Concept of Rights*, 1982 *Bu. Austl. Soc. Leg. Phil.* 72 (1982) 72.

²⁹⁸ Citing from A. G. Chloros, at 19.

²⁹⁹ T. D. Campbell, at 73. See also John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge: Cambridge University Press, 2007) Part One.

³⁰⁰ Constitution (1982, as amended in 1993), art. 15.

³⁰¹ Compare art. 13(1) of Constitution (1982) with art. 13(1) of Constitution (1982, as amended in 2004) and Property Law (2007).

³⁰² China's Property Law (2007), art. 4.

³⁰³ Compare art. 12 with art. 13 of Constitution (1982, as amended in 2004).

³⁰⁴ Andrew Moody, “China: Debate renewed on public, private firms,” available at <http://www.asianews.eu/content/china-debate-renewed-public-private-firms-83902> (last visited May 10, 2019).

noted later, China reaffirms that the state-owned economy should be continually enhanced.

3.3.2 Public-Private Mechanisms: Taking SOEs as an Example

The significance of Chinese unique public-private relationship for the rise of China partly lies in contributing to many public-private mechanisms, for instance, SOEs examined below,³⁰⁵ that appear efficient in enhancing the rise of China but are not easily managed by international law. It can be also suggested that public-private mechanisms in China are organized to sustain the Chinese unique public-private relationship.

3.3.2.1 *How International Law Manages Private Entities*

According to Article 5 of the ILC Draft Articles on State Responsibility, the conduct of a private entity which is not an organ of a state but “which is empowered by the law of that State to exercise elements of the governmental authority” shall be considered “an act of the State under international law, provided the person or entity is acting in the capacity in the particular instance.”³⁰⁶ However, Crawford has pointed out that for the purpose of attribution of private entities’ conduct to the state,

[t]he fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive.³⁰⁷

Rather, what is decisive is “the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific, to exercise specific elements of governmental authority.”³⁰⁸

Thus, the existence of “governmental authority” is crucial to be able to attribute private activities to the state. However, Article 5 does not seek to identify precisely the scope of “governmental authority.” According to Crawford, under Article 5,

[b]eyond a certain limit, what is regarded as “government” depends on the particular society, its history and traditions. Of particular importance will be

³⁰⁵ See Section 3.3.2.2.

³⁰⁶ Responsibility of States for Internationally Wrongful Acts, A/RES/56/83, January 28, 2002.

³⁰⁷ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 100.

³⁰⁸ *Id.*

not just the content of the powers, but the way they are conferred on an entity, the purpose for which they are to be exercised and extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstance.³⁰⁹

This implies that, in the attribution of private entities' activities, the domestic particularities of a state should be given sympathetic consideration. In other words, a state can invoke its domestic particularities to argue that activities of private entities should not be attributed to that state.

Furthermore, activities of private entities may still be likely to be attributed to a state, even though it is not empowered to exercise governmental authority. Article 8 of the ILC Draft Articles on State Responsibility provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction of control of, that State in carrying out the conduct.

In accordance with Article 8, the conduct of a private entity shall be attributed to a state if it is carried out under either the "instruction" or "control" of a state, regardless of whether that conduct concerns governmental activity.³¹⁰ However, the "instruction or control" test should target a "specific operation" and should be an "integral part of that operation."³¹¹ Therefore, any conduct should be evaluated on a case-by-case basis, and it should be indispensable for an operation to be attributed to a state.

Specially, the conduct of companies owned and controlled by a state is addressed in the ILC Draft Articles on State Responsibility. As Crawford observed, corporate entities owned by and, in that sense, controlled by a state are considered separate from that state. Therefore, their conduct, "prima facie," should not be attributable to that state unless they exercise governmental authorities as provided in Article 5.³¹² This implies that those asserting the existence of "instruction" or "control" should bear the burden of proof.

Of course, *lex specialis* exists in respect to attribution of conduct of private entities to a state. For instance, private entities may constitute a "public body" in accordance with the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").³¹³

³⁰⁹ *Id.*, at 101.

³¹⁰ *Id.*, at 110.

³¹¹ *Id.*

³¹² *Id.*, at 112.

³¹³ See SCM Agreement, art. 1.1(a)(1).

Obviously, it is the involvement of public entities in the conducts of public entities in one way or another that makes it likely to attribute conducts of private entities to a state on some occasions. This implies that those private entities should be scrutinized from the perspective of public-private mechanism.

3.3.2.2 *Chinese SOEs as a Public-Private Mechanism*

SOEs have always occupied profound economic, social, and political importance in China, which is assumed to derive from the socialist identity of China. In the late 1970s when China started the Reforming and Opening-up Policy, SOEs delivered seventy-eight percent of industrial output and employed 76 percent of all industrial workers; SOEs absorbed eighty-four percent of increments to industrial fixed assets during 1975–1980.³¹⁴ They were not autonomous business firms, but were “basic production units run directly by the government” or as “part of the government.”³¹⁵ Therefore, Chinese SOEs were justified to claim state immunity in accordance with international law. As a result, traders and investors from Western countries were discouraged from doing business with Chinese SOEs. In order to tackle this problem, since the 1980s China has agreed that SOEs were not eligible to state immunity, even though their operation remained controlled by the CCP-led government.³¹⁶ Since the 1990s, China began to corporatize SOEs in accordance with the Company Law adopted in 1993.³¹⁷ In March 2003, China established the State-owned Assets Supervision and Administration Commission (SASAC) under the State Council. In accordance with a law governing the state-owned assets, the SASAC, on behalf of the State Council, exercises the duties and responsibilities of the “state investor.”³¹⁸ As of December 2018, the SASAC directly owns ninety-six SOEs, many of which are “national champions.”³¹⁹ In addition, a huge amount of SOEs are owned by the SASAC local branches, for instance, the Beijing SASAC.³²⁰ It should be stressed that China appears to have attached more importance to SOEs. For instance, in 2013, the CCP Central Committee stressed that China must firmly strengthen state-owned economy, maintain its leading role, and

³¹⁴ Citing from Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-owned Enterprises*, 47 *Cornell Int'l L.J.* 632 (2014) 644.

³¹⁵ *Id.*, at 644–645.

³¹⁶ Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 *J. Chinese L.* 23 (1987) 30.

³¹⁷ China's Company Law (1993), arts. 7, 45, 64–71; China's Company Law (1993, as amended in 1999), art. 67.

³¹⁸ Interim Regulation Concerning the Management and Supervision on State-owned Assets in Enterprises (adopted by the State Council on May 27, 2003), art. 12.

³¹⁹ “List of Central-governmental enterprises,” available at <http://www.sasac.gov.cn/n2588035/n2641579/n2641645/index.html> (last visited May 15, 2019).

³²⁰ “List of enterprises under supervision,” available at <http://gzw.beijing.gov.cn/yggq/jgqy/> (last visited May 16, 2019).

enhance its “viability, controlling force, and influence [huo li, kong zhi li, ying xiangli].”³²¹ Therefore, Chinese SOEs are highly relevant to the rise of China.

So far, the scrutinization of Chinese SOEs in the literature has focused on three major issues. The first concerns the corporate governance of the SOEs. For instance, Johns argued that Chinese SOEs characterized the ambiguous state-enterprise property relationship, suggesting that China’s government begin to privatize and corporatize the SOEs with an aim to increase their competitiveness. Johns warned, however, that the state intervention was a daunting hindrance to the governance reform of Chinese SOEs.³²² The second observation concerns the difficulties created by SOEs for China’s integration into globalization. These debates center on why SOEs hinder the negotiations on China’s accession to the GATT/WTO and how China has reformed the SOEs to satisfy the GATT/WTO disciplines including state trading rules.³²³ In particular, Blumental suggested that the huge and inefficient SOEs would increase the difficulty for China in complying with WTO commitments.³²⁴ The third and more recent observation concerns the challenges that China’s SOEs pose to international economic order.³²⁵ SOEs are considered an important instrument used by China to practice state capitalism. For instance, Wu coined “China, Inc.” to describe how China poses a challenge for the international economic order by, among other, relying on SOEs.³²⁶

³²¹ The Decision Concerning Some Major Issues in Comprehensively Deepening Reforms (approved by the third planetary meeting of 18th Central Committee of the CCP, October 12, 2013).

³²² Deborah Kay Johns, Reforming the State-Enterprises Property Relationship in the People’s Republic of China: The Corporatization of State-Owned Enterprises, 16 *Mich. J. Int’l L.* 911 (1994–1995). See also Zhongfei Zhou and Jingwei Li, In Search of Approaches to Improving Corporate Governance in China’s State-Owned Commercial Banks, 36 *Int’l L.* 215 (2002); Chenxia Shi, Recent Ownership Reform and Control of Central State-Owned Enterprises in China: Taking One Step at a Time, 30 *U.N.S.W.L.J.* 855 (2007); Kan Zhang, Corporate Governance in China: How Does the State Influence Its Own Enterprises?, 9 *Int’l L. & Mgmt. Rev.* 111 (2012–2013); Jiangyu Wang, The Political Logic of Corporate Governance in China’s State-owned Enterprises, 47 *Cornell Int’l L.J.* 631 (2014); Christopher Chen, Solving the Puzzle of Corporate Governance of State-Owned Enterprises: The Path of the Temasek Model in Singapore and Lessons for China, 36 *Nw. J. Int’l & Bus.* 303 (2016).

³²³ David Blumental, “Reform” or “Opening”? Reform of China’s State-Owned Enterprises and WTO Accession—The Dilemma of Applying GATT to Marketizing Economies, 16 *UCLA Pac. Basin L.J.* 198 (1997–1998); David M. Blumental, Applying GATT to Marketizing Economies: The Dilemma of WTO Accession and Reform of China’s State-Owned Enterprises (SOEs) (hereinafter “David M. Blumental (1999)”), 2 *J. Int’l Econ.* 113 (1999); Julia Ya Qin, WTO Regulation of Subsidies to State-Owned Enterprises (SEO)—A Critical Appraisal of the China Accession Protocol, 7 *J. Int’l Econ. L.* 863 (2004).

³²⁴ David M. Blumental (1999), at 115–117.

³²⁵ Mark Wu, The “China, Inc.” Challenge to Global Trade Governance, 57 *Harv. Int’l L.J.* 261 (2016); Li-Wen Lin and Curtis J. Milhaupt, We Are the (National) Champions: Understanding the Mechanism of State Capitalism in China, 65 *Stan. L. Rev.* 697 (2013); Li-Wen Lin, China’s National Champions: Governance Change Through Globalization?, 11 *U. Pa. Asian L. Rev.* 81 (2015–2016); Ming Du, China’s State Capitalism and World Trade Law, 63 *Int’l & Comp. L.Q.* 409 (2014).

³²⁶ See, e.g., Mark Wu, at 264.

However, the framework of public-private relationship has not been used to scrutinize Chinese SOEs. The lack of a public-private relationship perspective makes observers difficult to fully understand why the SOEs play a prominent role in the rise of China and, more importantly, why they are not easily managed by international law in force. In my opinion, Chinese SOEs are significant because they represent a unique public-private mechanism which is created by interactions between public institutions (the CCP-led Chinese government) and private institutions (corporate entities). This mechanism is so unique that, while expanding their business operations and thus enhancing the rise of China, Chinese SOEs can arguably still survive the scrutiny of current international law.

China always seeks to improve corporate governance of SOEs by drawing on international best practice. The trend should be examined from the perspective of the public-private mechanism. In August 2015, for instance, the CCP Central Committee and the State Council jointly issued the Guideline on the deepening SOE reforms (Guideline (2015)).³²⁷ The Guideline (2015) requires that SOEs adapt to new trend of “marketization, modernization and internationalization.” According to the Guideline (2015), the board of directors of SOEs should effectively exercise the decision-making, the management should autonomously run the business, and any governmental bodies should not intervene in SOEs business unless otherwise legally allowed.³²⁸ In order to implement the Guideline (2015), the General Office of the State Council approved a Guideline on corporate governance of SOEs (Guideline (2017)).³²⁹ The Guideline (2017) stresses that SOEs should be run in accordance with the Company Law (2014), the Law of Management of State-Owned Assets in Enterprises (2013), and the bylaw of SOEs.³³⁰ It is required that, until 2020, all wholly state-owned SOEs must establish boards of directors with a majority of external directors, while external directors should be selected to sit at all state-owned holding SOEs.³³¹ This corporate governance reform is expected to improve the efficiencies and competitiveness of Chinese SOEs. Far more important is its legal implication. As governmental bodies (for instance, SASAC) tend to exercise the “right” in SOEs arising from the capacity of “state investor” instead of the “power” arising from the capacity of “state regulator,” and SOEs continually draw on international best practice to improve their corporate governance, a new kind of public-private

³²⁷ The CCP Central Committee and the State Council, Guideline on Deepening SOEs Reform, August 24, 2015.

³²⁸ Guideline (2015), Part III (8).

³²⁹ General Office of the State Council, Guideline on Further Improving the Corporate Governance of SOEs, April 24, 2017.

³³⁰ Guideline (2017), Part I (2).

³³¹ Guideline (2017), Part I (3).

mechanism is thus established. This new public-private mechanism largely maintains the regulatory power of governmental bodies in an indirect manner, namely, exercising the shareholder rights of the “state investor,” but it does help Chinese SOEs claim that they should not be treated as either governmental organs or private entities exercising governmental authority as provided in the ILC Draft Articles on State Responsibility; rather, they should enjoy any rights and treatment available to private corporations provided in accordance with international law, for instance, investment treaties. In other words, Chinese SOEs should no longer be discriminated against. A more thorny issue is the involvement of the CCP in Chinese SOEs. Wang observed that the Party-state has fostered the growth of SOEs.³³² According to Wang, there are SOEs in other countries, and close relations between business and state are not uncommon in other countries; however, it is rare that the ruling party in a country exercises such influence over SOEs or is as omnipresent in their operation as the CCP is with Chinese SOEs.³³³ Take Temasek Holdings Pte. Ltd (Temasek) in Singapore as an example. Temasek is a state-owned company and also maintains strong ties to the People’s Action Party (PAP), the ruling party in Singapore. However, a majority of members of the board of Temasek are nonexecutive directors who are businessmen; by contrast, nearly all top officers and staff in Chinese SOEs are CCP members.³³⁴ Some Chinese commentators once suggested that China, in reforming SOEs’ governance, could learn from the pattern of Temasek.³³⁵ As Lin and Milhaupt suggested, however, the Temasek-ization would actually require less involvement by the CCP in key managerial appointments.³³⁶

According to Wang, the real control over Chinese SOEs comes from the CCP, which is achieved in four manners: (1) all officers and staff in SOEs must comply with the Party line in accordance with the CCP discipline; (2) the CCP decides the appointment and promotion of the top executives of SOEs; (3) the operation of SOEs must be consistent with the Party line; and (4) the CCP, in accordance with Party discipline, investigates and punishes SOE executives for their potential wrongdoing.³³⁷ Wang suggested that Party-state control over SOEs was “largely unique to China” and was “a puzzle” to many observers.³³⁸

The important thing is: Does the involvement of the CCP in SOEs in manners mentioned here lead to a conclusion that the conducts of Chinese SOEs

³³² Jiangyu Wang, at 647.

³³³ *Id.*, at 636.

³³⁴ Li-Wen Lin and Curtis J. Milhaupt, at 754–755.

³³⁵ See, e.g., Hao Wang, Main Features of Temasek Model and Their Reference on the China’s SOEs Reform, 5 *J. of the Party School of the Central Committee of the CCP* 50 (2011) (in Chinese).

³³⁶ Li-Wen Lin and Curtis J. Milhaupt, at 755.

³³⁷ Jiangyu Wang, at 635, 652.

³³⁸ *Id.*, at 636.

can be attributed to China's government? In light of the ILC Draft Articles on State Responsibility illustrated previously, it is hard to say "yes" because, in accordance with Article 33 of the CCP's Constitution (2012),³³⁹ the CCP, generally speaking, is not explicitly authorized to legally exercise power in particular business activities of SOEs. Notwithstanding, the conduct of SOEs is still likely to be attributed to China's government because Article 33 provides that the CCP "participates in making final decisions on major questions" in SOEs.

Since President Xi Jinping took the leadership in 2012, the role of the CCP in SOEs was strengthened, which represents more confidence of China on its socialist identity. For instance, the CCP's constitution revised in 2017 states that the CCP should "take the leadership" in SOEs.³⁴⁰ Indeed, China's Company Law (1994), in its amendment in 2014, for the first time included a CCP provision. Article 19 of the amended law provides that "in accordance with Charter of the Chinese Communist Party (CCP), the CCP branches are established in companies and carry out their activities. Companies shall facilitate the activities of the CCP organizations." That new law provided the legal basis for conducting political activities by the CCP in companies, including SOEs. It did not, however provide the legal basis on which the CCP would involve itself in SOEs' particular business activities. More importantly, the CCP seeks to enhance its involvement in in SOEs' business. Important efforts include the Guideline (2015) and Guideline (2017) mentioned previously, which prescribe how to legalize the involvement of the CCP in the SOEs' business. The Guideline (2015) explicitly states that the SOEs

persist and improve the leadership system of mutual involvement and mutual office-holding [shuang xiang jin ru, jiao cha ren zhi], under which, in accordance with legal procedure, qualified members of leadership of the CCP branches can be selected to sit at the Board of Directors, Board of Supervision,

³³⁹ Article 33 of the Constitution of the Chinese Communist Party (adopted November 14, 2012) provides, among others, that

[i]n a state-owned or collective enterprise, the primary Party organization acts as the political nucleus and works for the [better] operation of the enterprise. The primary Party organization guarantees and supervises the implementation of the principles and policies of the Party and the state in its own enterprise and backs the meeting of shareholders, board of directors, board of supervisors and manager (factory director) in the exercise of their relevant functions and powers according to law. It relies wholeheartedly on the workers and office staff, supports the work of the congresses of representatives of workers and office staff and participates in making final decisions on major questions in the enterprise. It works to improve its own organization and provides leadership over ideological and political work, efforts for cultural and ethical progress and the trade unions, the Communist Youth League and other mass organizations." See Jiangyu Wang, at 655–656.

³⁴⁰ Constitution of the Chinese Communist Party (adopted October 24, 2017), art. 33, available at <http://www.12371.cn/special/zggcdzc/zggcdzcqw/>.

Management while the qualified CCP members of Board of Directors, Board of Supervision, Management may be selected as members of leadership of the CCP branches; members of management and members of leadership of the CCP branches mutually involve and hold offices if appropriate . . . secretaries of the CCP branches and chairmen of the board of directors shall in principle be same persons.³⁴¹

The Guideline (2017), which was adopted in accordance with the Guideline (2015), provides more requirements aimed to achieve “mutual involvement and mutual office-holding [shuang xiang jin ru, jiao cha ren zhi].” First, the SOEs’ bylaws shall affirm the legal status of the CCP in corporate governance and provide for the powers of the CCP in the decision-making and daily operation of the company. Secondly, senior officers and staff who are the CCP members shall annually report to the CCP concerning their business performance and personal integrity. Third, members of the discipline organ of the CCP branches may attend the meeting of the board of directors and its business committees; fourth, when the board of directors recruits executive officers, the CCP branches have the power to establish qualifications and to recommend the candidates.³⁴²

Obviously, China purports to internalize the CCP involvement in SOEs governance in a legal way rather than a political way, which makes SOEs a more sophisticated public-private mechanism. However, it remains to be seen as to whether this internalization will reduce or increase the risk of SOEs being identified as governmental bodies or the conduct of SOEs being attributed to China’s government. As the SASAC illustrated, the trend that the CCP members, through the mutual involvement and mutual office-holding, are empowered to act on specific matters of SOEs in the capacity of being members of board of directors, and so on, arguably reduces such a risk. This, however, may intensify the concern that China’s CCP-led government has no intention to reduce the involvement in a market economy. Furthermore, it is hard to say the practice, that is, that the CCP branches have the power to establish qualifications and to recommend the candidates, represents international best practice in corporate governance. As a result, some other states might seek to improve or create a legal framework at the international and/or national level in order to engage Chinese SOEs more effectively. As illustrated in the following, the trend appears to have emerged.

³⁴¹ Guideline (2015), Part VII.

³⁴² Guideline (2017), Part II (5).

3.3.2.3 How International Law Manages Chinese SOEs

In order to relieve the wariness of foreign companies that Chinese SOEs would claim state immunity in their transactions, since the 1980s China has begun to legally disassociate SOEs from government, affirming that Chinese SOEs could not claim state immunity in their business with foreign counterparts,³⁴³ even though some Chinese SOEs sometimes have claimed state immunity in foreign courts in several countries like the U.S and Singapore.³⁴⁴ This means that, in the view of China's government, the nature of China's SOEs should not be examined with international law on state immunity. However, several Chinese SOEs succeeded in invoking state immunity in American courts by arguing they constitute "agency or instrumentality of a foreign state" under Article 4 of the Foreign Sovereign Immunities Act.³⁴⁵ This implies that the issue of handling China's SOEs remains an important concern. Since China's SOEs maintain, if not increase, their prominent role in the rise of China, this issue, in the view of some countries, appears more pressing in the context of China's rise.

Some countries tend to link, in some way or another, Chinese SOEs with government, presumably with an aim to impose more rigid regulation on Chinese SOEs. A noticeable case is *Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US-AD & CVD (China))*. On September 19, 2008, China requested consultations with the U.S. pursuant to WTO agreements. The consultations concerned definitive anti-dumping and countervailing duties imposed by the U.S. on imports from China.³⁴⁶ A major contestation concerned the nature of China's SOEs production inputs and state-owned commercial banks (SOCBs) providing loans.³⁴⁷ At the core of the contestation is whether China's SOEs and SOCBs constitute a "public body" or "government" referred to in Article 1.1(a)(1) of the SCM Agreement, which unfortunately does not give a definition.

China argued that the U.S. Department of Commerce (USDOC)'s findings, namely, that SOEs and SOCBs were "public bodies," were unfounded. China maintained that there was no evidence that SOEs were "vested with and exercised governmental authority"; therefore, the activities of SOEs should be

³⁴³ Dahai Qi, at 315. See also Wang Houli, at 30.

³⁴⁴ Dahai Qi, at 325, 335.

³⁴⁵ For example, *Cathode Ray Tube (CRT) Antitrust Litig.*, 2018 WL 659084 (N.D. Cal. Feb. 1, 2018), *Chinese-Manufactured Drywall Products Liability Litigation*, 168 F. Supp. 3d 921 (U.S. District Court, E.D. La. 2016) and *Global Tech., Inc. v. Yubei (Xinxiang) Power Steering Sys. Co.*, 807 F.3d 806 (6th Cir. 2015). See Qingming Li, *On the State Immunity of Chinese State-Owned Enterprises in the Civil Procedures of the United States Courts*, 2018 (11) *J. Jiangxi Soc. Sci.* 167 (2018) (in Chinese).

³⁴⁶ *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US-AD & CVD (China))*, WT/DS379/R, October 22, 2010 (Panel Report), para. 2.1.

³⁴⁷ Panel Report, para. 8.3.

identified as those of “private bodies, not public bodies.”³⁴⁸ By invoking *US—Countervailing Duty Investigation on DRAMS*, China argued that the actions of SOEs are *prima facie* private, and thus presumptively not attributable to a WTO Member. China criticized the approach of the U.S., which primarily relied on a per se rule of majority government ownership in determining that the relevant entities were “public bodies,” and argued that was not allowed in accordance with the principles of treaty interpretation. China’s argument was that while government ownership is relevant to the inquiry as to control and whether a private body has been directed to perform governmental functions, it had “little relevance in determining whether an entity is a public body.”³⁴⁹ According to China, a public body is an entity which “must be authorized by the law of the state to exercise functions of a governmental or public character, and the acts in question must be performed in the exercise of such authority.”³⁵⁰ In other words, what distinguishes the conduct of public bodies from that of private bodies “is not the degree of government ownership,” but “the source and nature of the authority the entities possess and exercise.”³⁵¹ Importantly, China argued that it did not assert that SOEs could never be public bodies, but rather that their conduct should be deemed “presumptively private.”³⁵² In that case, however, there was no evidence to establish that the SOEs were authorized to exercise governmental authority, therefore, the SOEs’ activities were deemed to be those of private entities.³⁵³

In contrast, the U.S. invoked the conclusion that the panel made in *Korea—Commercial Vessels*, namely, that an entity will constitute a public body if it is controlled by the government or other public bodies.³⁵⁴ The U.S. noted that, although the panel in that case cited other evidence (for instance, the government appointed the relevant managers and directors), it gave the “most weight” to the issue of government ownership.³⁵⁵ The U.S. claimed that the reasoning of that panel was consistent with the ordinary meaning of the term “public body” in its context and in light of the object and purpose of the SCM Agreement. In brief, the U.S. argued that “majority government ownership can demonstrate control, in that government ownership gives the government the ability to appoint managers and directors and thereby to oversee operations.”³⁵⁶

³⁴⁸ *Id.*, para. 8.3.

³⁴⁹ *Id.*, para. 8.4.

³⁵⁰ *Id.*, para. 8.5.

³⁵¹ *Id.*, para. 8.5.

³⁵² *Id.*, para. 8.6.

³⁵³ *Id.*, para. 8.5.

³⁵⁴ *Id.*, para. 8.30.

³⁵⁵ *Id.*, para. 8.30.

³⁵⁶ *Id.*, 8.30.

According to the panel, “public body” in the meaning of the SCM Agreement is “an entity controlled by a government”³⁵⁷ and there is “no legal error, in analyzing whether an entity is a public body, in giving primacy to evidence of majority government-ownership.”³⁵⁸ The panel argued that, while the five factors³⁵⁹ relied upon by the USDOC were relevant to the issue of control, there was no basis in the SCM Agreement on which the consideration of these particular five factors would constitute a legal prerequisite to arriving at a valid finding that an entity is controlled by a government and further is a public body in the sense of the SCM Agreement.³⁶⁰ The panel admitted that “public body determinations are to be made case-by-case, on the basis of the evidence of record in a given investigation, and the authority’s determination must explain its analysis based on the evidence before it, in order for that determination to be reasoned and adequate and thus consistent with the SCM Agreement.”³⁶¹ In particular, the panel was in favor of the idea that if SOEs were completely insulated from any government involvement in, or influence over, its operations, it could be asserted that they were not controlled by the government. However, the relevant government is obliged to present the evidence that proves this insulation.³⁶² In addition, the panel found that China did not contest the factual findings of the USDOC that China’s government owned the large majority share of the SOCBs and exercised significant control over their operations; rather, China only argued that government ownership and control were not relevant to whether the SOCBs were public bodies.³⁶³ Finally, the panel decided that

China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining in the relevant investigations at issue that SOEs and SOCBs constituted “public bodies.”³⁶⁴

However, the conclusion of the panel was partly rejected by the Appellate Body (AB). The AB first sought to discern the meaning of “government.” It distinguished “function” from “authority,” suggesting that the meaning of

³⁵⁷ *Id.*, 8.124.

³⁵⁸ *Id.*, 8.136.

³⁵⁹ They include (1) government ownership; (2) government presence on the board of directors; (3) government control over activities; (4) pursuit of governmental policies/interests; and (5) whether the entity was created by statute. Panel Report, para. 8.101.

³⁶⁰ Panel Report, para. 8.125.

³⁶¹ *Id.*, para. 8.136.

³⁶² *Id.*, para. 8.136.

³⁶³ *Id.*, para. 8.139.

³⁶⁴ *Id.*, para. 17.1.

government “is derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers* and *authority* to perform those functions.”³⁶⁵ Furthermore, given that the “government” in the narrow sense and “public body” are placed together under the collective term “government,”³⁶⁶ the AB suggested that the meaning of the word “government” informed the meaning of “public body.”³⁶⁷ In short, the AB held that a public body within the SCM Agreement

must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a) (1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.³⁶⁸

Obviously, the AB is inclined to hold a conception of “government authority” similar to that in the ILC Draft Articles on State Responsibility.

The AB noted that “the same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body,”³⁶⁹ which would increase the complexity in “determining whether an entity is a public or private body.”³⁷⁰ The AB stressed that the assessment must focus on evidence relevant to the question of whether the entity “is vested with or exercises governmental authority.”³⁷¹ That an entity exercises governmental functions demonstrates that it possesses or has been vested with governmental authority, “particularly where such evidence points to a sustained and systematic practice.”³⁷² However, the AB pointed out, apart from an express delegation of authority in a legal instrument, the existence of “mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.”³⁷³ Thus, the mere fact that a government is the majority shareholder of an entity does not establish that it exercises meaningful control over the conduct of that entity, “much less that the

³⁶⁵ Appellate Report, para. 290.

³⁶⁶ *Id.*, para. 288.

³⁶⁷ *Id.*, para. 290.

³⁶⁸ *Id.*, para. 317.

³⁶⁹ *Id.*, para. 318.

³⁷⁰ *Id.*, para. 345.

³⁷¹ *Id.*, para. 345.

³⁷² *Id.*, para. 318.

³⁷³ *Id.*, para. 318.

government has bestowed it with governmental authority.”³⁷⁴ However, if there is the evidence that government control is “manifold” and that such control has been exercised “in a meaningful way,” the entity concerned can be inferred to exercise governmental authority.³⁷⁵

Based upon this conception of public body, the AB disapproved of the panel’s interpretation that “public body” means “any entity controlled by a government.” It noted that, while recognizing the issue of government ownership to be “highly relevant,” the panel did not further clarify its notion of control.³⁷⁶ Furthermore, although there is “everyday financial concept of a ‘controlling interest’ in a company,” the AB suggested that the control of an entity by a government itself was not sufficient to establish that an entity is a public body.³⁷⁷ In particular, the panel also mentioned that the USDOC did not apply a “simple per se majority ownership test,” and while it examined all of the evidence and arguments that were before it, the panel did not “identify or refer to any particular passages from the USDOC’s determinations.”³⁷⁸ As a matter of fact, the AB found the USDOC, apart from ownership information, did not ask for other information relating to the elements of the five-factor test. This indicated that the USDOC failed to comply with its duty to seek out relevant information and to objectively evaluate in order to ensure that its determinations relied upon sufficient facts.³⁷⁹ In a word, the USDOC was wrong in solely relying on the ownership to establish that a SOE is a public body.

Furthermore, the AB pointed out that, apart from the control of the government, the panel failed to consider whether any other criteria could potentially be relevant to the inquiry, or whether any indicia other than state ownership are relevant to government control. The panel also did not sufficiently analyze whether the interpretative elements that formed the basis for its finding that state ownership or control were in and of themselves sufficient to establish that an entity constitutes a public body.³⁸⁰ Thus, the AB reversed the panel’s finding that the “public body” in Article 1.1(a)(1) of the SCM Agreement means “any entity controlled by a government.”³⁸¹

However, the AB affirmed the determinations by the USDOC and the panel concerning the SOCBs. The AB found that, in addition to the information regarding ownership and control, the USDOC also considered other factors,

³⁷⁴ *Id.*, para. 318.

³⁷⁵ *Id.*, para. 318.

³⁷⁶ *Id.*, para. 320.

³⁷⁷ *Id.*, para. 320.

³⁷⁸ *Id.*, para. 346.

³⁷⁹ *Id.*, para. 346.

³⁸⁰ *Id.*, para. 321.

³⁸¹ *Id.*, para. 322.

such as China's Commercial Banking Law and Bank of China's Global Offering, which states that the law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions. Based on these facts, the AB agreed that "these considerations, taken together, demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government."³⁸²

More than ten WTO Members joined that case as third parties. They presented their understanding on the meaning of "public body." Argentina and Canada supported the argument that ownership and control can be relied on to establish an entity is a public body.³⁸³ However, most third parties suggested that the ownership and control was pertinent, but not sufficient to come to a conclusion that an entity is a public body.³⁸⁴

Besides the WTO forum, the SOE-related issues have also recently been debated before international investment tribunals. However, SOEs are treated differently in investment treaties. There is no conception of "public body" in investment treaties. More importantly, investment treaties appear to treat SOEs and pure private investors equally. Thus, while the ICSID Convention speaks of "the role of private international investment," a "national" who is eligible for the ISDS remedy is not a term restricted to privately owned companies; rather, "a wholly or partially government-owned company" can also become be a party to proceedings brought by or against a foreign state.³⁸⁵ In this regard, Broches gave an authoritative explanation. Broches said:

In today's world the classical distinction between private and public investment, based on the source of the capital, is no longer meaningful, if not outdated. There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a "national of another Contracting State" *unless it is acting as an agent for the government or is discharging an essentially governmental function* (emphasis added).³⁸⁶

³⁸² *Id.*, para. 355.

³⁸³ Panel Report, paras. 8.42, 8.45.

³⁸⁴ *Id.*, paras. 8.43, 8.44, 8.46, 8.47–8.50.

³⁸⁵ ICSID, History of the ICSID Convention, vol. II–1, 1968, at 230.

³⁸⁶ Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press) 161.

Broches' Test was supported by many investment tribunals.³⁸⁷ For instance, in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* ("CSOB"), the ICSID tribunal held:

It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature.³⁸⁸

As a matter of fact, a "state enterprise," which means an enterprise "owned, or controlled through ownership interests" by a government, is commonly defined as an "investor of a Party" in investment treaties.³⁸⁹

China's SOEs were first debated in *Beijing Urban Construction Group (BUCG) v. Republic of Yemen*.³⁹⁰ In this case, Yemen's government argued that, in accordance with the *Broches* test, BUCG, a Chinese SOE, "is both an agent of the Chinese Government and discharges governmental functions even in its ostensible commercial undertakings" and therefore was not "a national of another Contracting Party" under the ICSID Convention. As a result, the tribunal had no jurisdiction. In support of this, the respondent cited Article 5 of the UNILC's Draft Articles on State Responsibility.³⁹¹ Also relying on the *Broches* test, however, BUCG replied that "in respect of this [airport] project it did not act as an agent of the PRC Government nor discharge any governmental functions in making its investment in Yemen" and that it did not act "under the direction or control of the PRC Government in relation to the Sana'a Airport contract." Accordingly, BUCG had the right to bring claims against Yemen.³⁹²

In formulating its argument on the legal nature of BUCG, the Yemeni government relied on a variety of information. For instance, BUCG is subject to the

³⁸⁷ *Id.*, at 162.

³⁸⁸ *Ceskoslovenska Obchodni Banka A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999, para. 20.

³⁸⁹ See, e.g., 2012 US Model BIT, art. 1; 2015 India Model BIT, art. 1.16.

³⁹⁰ *Beijing Urban Construction Group v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision of Jurisdiction, May 31, 2017.

³⁹¹ *Id.*, para. 31.

³⁹² *Id.*, paras. 29, 30.

overall direction of a governmental organ that is the “representative of the state interests and the operation decision making organ, which should be responsible for the value maintenance and increment of the state-owned assets within the scope of authorisation.” Furthermore, a governmental document stressed that BUCG must “accept the supervision and inspection of Beijing State-owned Assets Supervision and Administration Bureau and Beijing Finance Bureau.” The Yemeni government also presented evidence that the CCP committee in BUCG is required to focus on “supervising human resources, finance and materials” and “monitoring the implementation of the scientific concepts of development and national policies, to promote enterprises to play a leading role in carrying out political and social responsibility.”³⁹³

Recognizing that “these corporate controls and mechanisms are not surprising in the context of PRC,” the tribunal held that “the issue is not the corporate framework of the State-owned enterprise, but whether it *functions* as an agent of the State in the fact specific context.”³⁹⁴ The tribunal contended that there was no evidence to demonstrate that BUCG was acting as an agent of the Chinese state in any relevant sense of the word “agent”; as a matter of fact, BUCG had participated in the airport project as “a general contractor following an open tender in competition with other contractors.”³⁹⁵

As to whether BUCG discharged a governmental function, the tribunal held that, while Yemen’s finding as to BUCG in the broad context of the Chinese state-controlled economy is “convincing,” it is “largely irrelevant” in the “particular instance” of the airport project. There was no evidence that BUCG discharged a governmental function as opposed to a purely commercial function.³⁹⁶ The tribunal also rebutted the contention of Yemen that China’s government is the “ultimate” decision maker for key management, operational, and strategic decisions. The tribunal believed that this assertion was “too remote from the facts of the Sana’a International Airport project to be relevant.”³⁹⁷ Finally, the tribunal affirmed that BUCG did not fulfill Chinese governmental functions within the sovereign territory of Yemen.³⁹⁸

Thus, it can be argued that the current international law is not capable of effectively regulating Chinese SOEs as expected by those countries like the U.S.

3.3.2.4 *New Legal Framework toward Chinese SOEs*

Since Chinese SOEs have been rapidly expanding their business around the world and international law in existence fails to regulate Chinese SOEs, SOEs

³⁹³ *Id.*, para. 37.

³⁹⁴ *Id.*, para. 39.

³⁹⁵ *Id.*, paras. 39, 40.

³⁹⁶ *Id.*, para. 42.

³⁹⁷ *Id.*, para. 43.

³⁹⁸ *Id.*, para. 44.

have given rise to fierce quarrels between China and several countries like the U.S.³⁹⁹ Some countries have begun to seek new approaches in order to engage Chinese SOEs more effectively. The first approach is that these countries seek to craft more stringent discipline on SOEs. The TPP was signed in 2016 by twelve countries including the U.S. and represents important progress in creating a new international legal framework. Two obligations are imposed on each contracting party: on the one hand, it must ensure its SOEs run their activities in accordance with “commercial consideration”; on the other hand, it cannot provide its SOEs with “non-commercial assistance.”⁴⁰⁰ Obviously, the TPP discipline is more rigorous than that in general international law or *lex specialis* like WTO agreements and investment treaties. It is believed that the TPP’s provisions on SOEs were prepared “clearly with Chinese SOEs in mind.”⁴⁰¹ However, it is expected that the TPP can play a very limited role in engaging Chinese SOEs. The TPP has only twelve contracting parties. In particular, the U.S., the leader in the TPP negotiations, withdrew from the TPP on January 24, 2017, because of political backlash, demonstrated by President Trump, who believed the TPP was a bad deal for the U.S.⁴⁰² Furthermore, there has already existed a network of treaties between China and many countries including most TPP contracting parties which do not include SOE provisions like those in the TPP. Therefore, China can rely on these treaties to challenge any measures that the other contracting party may take against Chinese SOEs. Moreover, any initiative to propose SOE provisions unfavorable to Chinese SOEs in any forum in which China is involved, such as the WTO, is expected to be rejected by China. For instance, Zhang Xiangchen, China’s ambassador to the WTO, warned that those countries that attempt to “put China in a tailor-made straightjacket of trade rules to constrain China’s development” will finally disappointed themselves.⁴⁰³

The second approach is that some countries seek more strict regulation of Chinese SOEs by strengthening their domestic laws already in existence or by adopting new laws. The U.S. leads this approach. In the past decade, the Committee on Foreign Investment in the U.S. (CFIUS) significantly increased

³⁹⁹ See, e.g., Dennis Shea, “Views on China’s Trade-Disruptive Economic Model and Implication for the WTO” (July 26, 2018), available at <https://geneva.usmission.gov/2018/07/27/55299/>; Statement by H.E. Ambassador Dr. Zhang Xiangchen at the WTO General Council Meeting (July 26, 2018), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoints/201807/20180702770676.shtml> (last visited May 16, 2019).

⁴⁰⁰ TPP, arts. 17.4 and 17.6.

⁴⁰¹ Mark Wu, at 316.

⁴⁰² “Trump: TPP was a bad deal for the country,” available at <https://www.cnn.com/video/2018/02/23/trump-tpp-was-a-bad-deal-for-the-country.html> (last visited May 16, 2019).

⁴⁰³ On the reform of the WTO Intervention by H.E. Ambassador Zhang Xiangchen at the Luncheon in Paris Workshop (November 20, 2018), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoints/201811/20181102808197.shtml> (last visited May 16, 2019).

the use of national security review (NSR) against investment initiatives from Chinese investors, especially China's SOEs. As a matter of fact, the NSR is a major issue for China to consider when attempting to negotiate a BIT with the U.S.⁴⁰⁴ Furthermore, the U.S. adopted the Foreign Investment and National Security Act (FINSA) of 2007. The new law significantly strengthened the NSR by, for instance, adding new facts for consideration in conducting the NSR.⁴⁰⁵ This law was largely inspired by the failed bid of China National Offshore Oil Corp. (CNOOC), a large Chinese SOE and China's third largest oil group, to buy Unocal, a U.S. oil company. Parties to that bid finally abandoned their plan because the CNOOC's status as an SOE provoked controversies in the U.S. Congress.⁴⁰⁶ Since a state has great discretion in creating and applying domestic laws either in good faith or in bad faith, the second approach might work better than the first approach. For instance, the U.S. asserts that, even if it reaches a BIT with China, the CFIUS's capability to protect national security will not be derogated.⁴⁰⁷ However, to what extent this approach may work remains to be seen. The improved corporate governance of Chinese SOEs observed previously, even though China's government is still likely to exercise meaningful influence, will make it much harder to sustain a state action intended to discriminate against Chinese SOEs.

It cannot be said, however, that international efforts targeting Chinese SOEs do not make a difference at all. Instead, China appears to somewhat yield to the growing pressure from some countries like the U.S. and the EU. For instance, it has been reported that China considers the possibility of embracing the "competitive neutrality."⁴⁰⁸

⁴⁰⁴ At the close of the 4th China-U.S. Strategy and Economic Dialogue held in June 2008, China stressed: "The U.S. will fully consider the written review concerning Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, and confirms that the review procedure of the Committee on Foreign Investment in the United States (CFIUS) will ensure all foreign investment, irrespective of source, to be treated uniformly, fairly." See Note of the 4th China-US Strategy and Economic Dialogue (June 27, 2008), available at http://news.xinhuanet.com/newscenter/2008-06/27/content_8450010.htm.

⁴⁰⁵ FINSA (2007), Section 4.

⁴⁰⁶ For instance, the House of the Congress adopted a nonbinding resolution, strongly opposing the proposed bid by the CNOOC because, among others, the CNOOC has a close relationship with China's government. H.R. Res. 344, 109th Congress, June 29, 2005.

⁴⁰⁷ U.S. Department of State, Bureau of Economic, Energy and Business Affairs, Fact Sheet: United States Launches Negotiations of an Investment Treaty with China, June 20, 2008.

⁴⁰⁸ Amanda Lee, "Can Chinese state firms compete fairly? Beijing claims 'competitive neutrality'" (October 15, 2018), available at <https://www.scmp.com/economy/china-economy/article/2168676/can-chinese-state-firms-compete-fairly-beijing-claims> (last visited May 16, 2019).

4. Concluding Remarks

As David Kennedy accurately observed, the twentieth century is a move to international institutions. International institutions are created one after another, and many of them steadily expand their authorities. Thus, international relations have been largely institutionalized. States often find that they cannot but apply for membership in international institutions. Otherwise, they are afraid that they will be unable to effectively participate in international affairs.

For great powers, international institutions, compared with traditionally unilateral or bilateral diplomacy, increase the efficiency and legitimacy by which they exercise their dominant power in this horizontal, sovereignty-based world. In particular, great powers often enjoy *de jure* or *de facto* privileges in international institutions, even though the principle of sovereign equality is ostensibly embraced by international institutions. However, as international power continually disperses among states, great powers have recognized that they can no longer readily pursue their state interests like before; instead, they are often challenged by less powerful states. As a result, some great powers, especially the U.S., turn to a more cautious approach to international institutions. In particular, the U.S. has exited from several international institutions.

China had been hostile to international institutions for approximately the two decades since the PRC was founded in 1949. Thus, China was an outsider with respect to nearly all international organizations. China, however, has gradually increased its engagement with international organizations, beginning after the PRC began to sit at the UN on behalf of China in 1971. China holds membership in more and more international institutions, and therein it continually seeks more of a say. China also develops partnerships with some international institutions to which it is not a member state. International institutions not only socialize China in international society, enhancing China's ability to behave in international society in accordance with international law, but also, these institutions are very important in helping China to defend its interests and expand its power. More importantly, as China is rising as a new great power, it has begun to sponsor new international institutions, for instance, the SCO and the AIIB. In the context of the rise of China, several concerns appear to have emerged. For instance, can international institutions effectively contain the behavior of a rising China? Furthermore, can China introduce a new institutional culture—especially in those international institutions that it sponsors, that is conducive to international peace, security, and prosperity of international society and, in particular, is friendly with developing countries, which, as China always argues, are less represented in international institutions?

Given the particularities of Chinese national governance, domestic institutions in China operate in a manner distinct from that of their

counterparts in countries like the U.S. Generally speaking, political expediency prevails over rule of law for Chinese public institutions when they deal with foreign relations or matters with foreign relations implications, for instance, treaty-making, but there is a trend that the conducting of foreign relations is subject to rule of law. Furthermore, China has taken advantage of its unique public-private relationship to enhance its rise. Specially, Chinese SOEs, which have played and will continue to play a prominent role in expanding China's economic power, inform people how the public-private mechanisms are sophisticatedly crafted for the rise of China. Some countries have recognized that the international law in existence cannot well manage Chinese SOEs and, more generally, China's unique public-private relationship. In response, they have taken some legal initiatives or measures targeting Chinese SOEs at both the international and the national level.

6

Chinese Courts

1. Introduction

For a long period, international law was perceived as the “esoteric preserve” of a moderate number of international law professors and legal officials while not being a part of the “professional lives of ordinary practitioners and national courts.”¹ “Times have changed,” however, said Lord Tom Bingham in a foreword given in 2005 where national courts were called on to deal with issues concerning international law “not on an occasional basis,” but “routinely, and often in cases of great importance.”² Inspired by that trend, in the past decade, international lawyers have not only sought to develop general theories for practice³ but also undertaken considerable comparative studies in this regard.⁴

How Chinese courts treat international law has attracted little attention,⁵ perhaps with the exception of those treaties regulating private relations like the UN Convention on Contracts for the International Sale of Goods (CISG),⁶ which clearly is not the focus of “public” international law. More importantly, international lawyers tend to be skeptical whether Chinese courts can play any meaningful role in the application of international law. For instance, André Nollkaemper contended that Chinese courts did little in coordinating

¹ Tom Bingham, Foreword, in Shaheed Fatima, *Using International in Domestic Courts* (Oxford: Hart Publishing, 2005). See also Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, 4 *Eur. J. Int'l L.* 159 (1993).

² Tom Bingham, Foreword.

³ See, e.g., Eyal Benvenisti and George W. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge: Cambridge University Press, 2017); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011).

⁴ See, e.g., David Sloss ed., *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009). Thirteen countries were covered in that comparative study.

⁵ For instance, China is the only permanent member state of the UN Security Council which was not included in a comparative survey on how domestic courts in thirteen countries apply treaties. See David Sloss ed., *id.*

⁶ See, e.g., Jie Huang, Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation, 5 *Manchester J. Int'l Econ. L.* 105 (2008); Xiao Yongping and Long Weidi, Selected Topics on the Application of the CISG in China, 20 *Pace Int'l L. Rev.* 61 (2008).

interaction between the international legal system and the national legal system and in securing China's compliance with international law.⁷

How Chinese courts treat international law is highly relevant to the efficiency and legitimacy of the rise of China, however. For instance, Chinese courts' reluctance to apply international law against executive organs may shield executive authority from being challenged and facilitate being exercised more efficiently, which is assumed by China as a major advantage of socialism. Furthermore, China, through its judicial administration, expounds its international legal arguments and these "state practices" may be helpful to enhance China's norm entrepreneurship in international law. Moreover, the growing involvement of Chinese courts in international law may improve China's image of respecting the rule of law at both an international level and a domestic level, which enhances the legitimacy of the rise of China.

Currently, the literature on the engagement between Chinese courts and international law almost belongs to purely textual analysis or piecemeal description of concrete cases.⁸ Though helpful, this literature fails to explore the long-term public policy underlying Chinese courts' structural application of international law or how Chinese courts' judicial activities in relation to international law relate to the rise of China. Furthermore, it does not capture some noticeable developments which have recently happened. In light of these, this chapter is intended to explore the context, dynamics, methods, structure of the application of international law in Chinese courts, and new roles that Chinese courts seek to play in the context of the rise of China. This chapter can not only inform the discussion surrounding what Chinese courts have done to enhance the rise of China but also suggest what more Chinese courts are expected to do for the rise of China.

This chapter is structured as follows. It begins, in section 2, by reviewing the theories concerning the engagement of domestic courts with international law

⁷ André Nollkaemper, at 13, 55.

⁸ See Ruijun Dai, *Domestic Implementation of International Human Rights Treaties: Global Perspective* (Beijing: Social Science Academic Press, 2013) 254–295 (in Chinese); Renren Gong, Implementing International Human Rights Treaties in China, in Errol P. Mendes and Anik Lalonde-Roussy eds., *Bridging the Global Divide on Human Rights: A Canada-China Dialogue* (Aldershot: Ashgate, 2003); Zhaojie Li (James Li), The Role of Domestic Courts in the Adjudication of International Human Rights: A Survey of the Practice and Problems in China, in Benedetto Conforti and Francesco Francioni eds., *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers, 1997); Zheng Sophia Tang, International Treaties in Chinese Private International Law, 42 *Hong Kong L.J.* 311 (2012); Sanzhuan Guo, Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects, 8 *Chinese J. Int'l L.* 161 (2009); Jie Huang, *id.*; Yongping Xiao and Weidi Long, *id.*; Guanxian Wang, *Theory and Practice Against Torture* (Shanghai: Shanghai Century Publisher, 2007) 270–277 (in Chinese).

that international lawyers have developed in light of the trend noted by Lord Tom Bingham. This section, through theoretic debate, places Chinese courts' approach to international law in a larger context of comparative international law, which is helpful to explain and predict Chinese judicial policy and practice in relation to international law. Section 3 investigates major factors relevant to the application of international law in Chinese courts. This investigation will uncover the contexts in which Chinese courts apply international law. Section 4 analyzes the methods that Chinese courts employ to apply international law. From the perspective of legal technique, it explains how international law is treated in Chinese courts. Section 5 investigates the structure of the application of international law, namely, which international legal rules are likely to be applied by a Chinese court, what that structural use of international law brought about to the rise of China, and what changes are expected to occur as China rises as a great power. This section thus explores the public policy pursuit underlying China's judicial approach to international law. Section 6 discusses new roles that Chinese courts seek to play in regard to international law in the context of the rise of China. It betokens how Chinese judiciary will refine its approach to international law in the coming years.

2. National Courts, International Law, and International and Domestic Rule of Law

How national courts engage international law has a bearing on the rule of law both at the international and at the domestic legal order, which closely relate to each other. However, engaging international law is not the sole means by which national courts affect the international legal order, even though it is surely a major one. How national courts apply national law may also affect, albeit in a less direct manner, the international legal order because judicial activities belong to the broad idea of a "state practice," which may be relied on by states to help the formation and application of international legal rules, from custom to treaty and to general principles of law. Nevertheless, here I focus on how national courts treat international law.

2.1 National Courts, International Law, and International Rule of Law

The lack of robust enforcement on its own at the international level had long been the Achilles' heel of international law, which was a major reason international law was once theoretically denied to be proper "law" but rather described

as merely “positive morality”;⁹ and why international law was often perceived as a “paper tiger” in real life. Domestic courts thus were expected to be an alternative to enforce international law. Some people had high expectations that national courts could act as “guardians” or “agents” of the international legal order, implementing international law in an impartial manner.¹⁰ Indeed, there has long existed a presumption that national courts can act as “enforcers” of international law.¹¹ The fact that national courts have been more active in applying international law over the past two decades has helped international obligations to be honored, and accordingly, international rule of law has been enhanced at the domestic level. However, as Thomas M. Franck pointed out, although being “generally cheaper and faster in serving the client” and having “administrative, political and executory conveniences,” national courts’ concept of international law may be parochial, and thus they are not always reliable sources for faithful application.¹² Thus, international courts should be required to “umpire” the international law even when it is applied domestically.¹³

In addition to the role of enforcers, Roberts Anthea further illustrated the role that national courts can play in creating and shaping international law. In this conception, national courts play dual roles of enforcers and creators of international law.¹⁴ Roberts suggested that, in accordance with Article 38 of the ICJ Statute,¹⁵ decisions of national courts, as evidence of state practice, are relevant to the interpretation of treaties and the formation of custom and as a subsidiary means, and are relevant to determine the existence and content of international law.¹⁶ Judge He Rong, a vice president of the SPC, contended that, by deciding some cases, national courts can not only exert influence on

⁹ J. Austin, *The Province of Jurisprudence Determined* (ed. H. L. A. Hart, London: 1954) 134–142.

¹⁰ H. Lauterpacht, Decisions of Municipal Courts as a Source of International Law, 10 *British Y.B. Int’l L.* 65 (1929) 93.

¹¹ Anthea Roberts, Comparative International Law—The Role of National Courts in Creating and Enforcing International Law, 60 *Int’l & Comp. L.Q.* 57 (2011) 60 (hereinafter “Anthea Roberts (2011)”).

¹² Thomas M. Franck, International Law: Through National Courts or International Courts, 8 *Vill. L. Rev.* 139 (1962) 141.

¹³ Thomas M. Franck, at 142.

¹⁴ Anthea Roberts (2011), at 60.

¹⁵ Article 38 of the ICJ Statute provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹⁶ Anthea Roberts (2011), at 62–63.

the interpretation and application of treaties but also promote the formation and development of customary international law and basic principles of international law, and even fill the legal vacuum in international law.¹⁷ She suggested that, as the BRI is gradually implemented, Chinese courts should be more active in participating in international economic rule-making by applying international treaties.¹⁸

Obviously, roles in enforcing and, in particular, in creating and shaping international law differ among national courts in different countries. National courts in powerful states, which participate more extensively and have a far larger say than other states in international relations, have more opportunities to apply international law. This means that in international legal practice their judicial activities are more likely both to be invoked as state practice by their own countries and, as international practice, to be considered by other countries. As a result, they are more likely to affect the international legal order. Let's take as an example the role of American courts in developing international rules on indirect expropriation in investment treaties. Indirect expropriation, together with direct expropriation, has long been included in investment treaties. In these treaties, apart from briefly mentioning that "indirect expropriation" refers to "measures equivalent to expropriation or nationalization," no further guideline to determine the existence of indirect expropriation existed.¹⁹ In adjudicating disputes concerning the Fifth Amendment, or "taking clause," of the U.S. Constitution, American courts established that, to determine the existence of a taking, such factors as the extent to which the measures at issue interfere with legitimate investment expectations and the character and intent of those should be included for consideration.²⁰ These factors firstly were largely transplanted in the U.S.-Singapore FTA (2003) with the aim of clarifying what constituted indirect expropriation,²¹ and then later included in some other investment treaties.²² If national courts in powerful states—for instance, Chinese courts—are reluctant to apply international law, their potential to affect international legal order will be reduced.

¹⁷ He Rong, at 9.

¹⁸ *Id.*

¹⁹ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2nd ed., 2012) 101.

²⁰ See, e.g., Vicki Been and Joel C. Beauvais, The Global Fifth Amendment? NAFTA's Investment Protection and Misguided Quest for an International "Regulatory Taking" Doctrine, 78 *N.Y.U. L. Rev.* 30 (2003); John A. Stanley, Keeping Big Brother out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence, 15 *Emory Int'l Rev.* 349 (2001); Tomas A. Hippler, Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of Noxious Use, Average Reciprocity of Advantage, and Bundle of Rights from Mugler to Keystone Bituminous Coal, 14 *B.C. Envtl. Aff. L. Rev.* 653 (1987).

²¹ U.S.-Singapore FTA (2003), Exchange of Letters on Explanation, May 6, 2003.

²² See, e.g., China-India BIT (2006), Protocol: III. Ad Article 5.

2.2 National Courts, International Law, and Domestic Rule of Law

In addition to affecting the international rule of law, national courts may also affect the domestic rule of law by applying international law. As international law continues to intrude into the domestic jurisdiction of a state, national courts exert growing influence on the rule of law at the domestic level. Noticeably, international lawyers often place the focus on what national courts can bring to a narrower sphere of the domestic legal order: foreign affairs. Foreign affairs, which traditionally was the domain of the executive branch while the parliament and the judiciary played marginal roles,²³ has long been perceived in a largely lawless state.

Traditionally, there have been two judicial policies of apology and avoidance in terms of applying international law by national courts, both of which are inclined to defer to executive authority. The policy of apology means that courts tend to justify the activities of the executive organs, and disregard concerns over their legitimacy. The policy of avoidance means that courts are reluctant to exercise judicial power over the activities of the executive branch. The two policies can be combined and referred to as the policy of deference. More recently, however, a policy of limiting has begun to emerge. This newly emerging policy means that courts may challenge the executive authority.²⁴

According to Benvenisti and Downs, there were three premises for the traditional policy of deference. This first is that foreign affairs is the province of the executive branch and isolated from the domestic arena where the rule of law should prevail. The second was that the executive can best effectively and faithfully represent national constituents in foreign affairs. The last was that the executive could better handle foreign affairs without the interference of the judiciary.²⁵ Benvenisti and Downs found, however, that all three premises, to different extents, no longer apply in today's world: the boundary between domestic affairs and foreign affairs are disappearing, and both are increasingly subject to international regulation; governments that are captured by interest groups cannot adequately represent all constituents; and governments often expose themselves to extreme international pressures which can be neutralized by the judiciary.²⁶ They also found that since the early 2000s courts in several

²³ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 14th reprint, 2003) 365–366.

²⁴ Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) 13–15, 69, 145.

²⁵ Eyal Benvenisti and George W. Downs, at 110–111. See also Eyal Benvenisti, Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts, 102 *Am. J. Int'l L.* 241 (2008) 244–245 (hereinafter “Eyal Benvenisti (2008)”). See also John Locke, *id.*, at 365–366.

²⁶ Eyal Benvenisti and George W. Downs, at 106–110, 111; Eyal Benvenisti (2008), at 245–247.

democratic countries have taken international law more seriously and, interestingly, have gradually abandoned the traditional policy of deference and shifted to a more aggressive policy of policing the executive branch.²⁷ Benvenisti defined the shift as a process of “reclaiming democracy,” which can help to maintain and enhance the domestic democratic process and the rule of law.²⁸ However, to what extent this newly emerging trend is occurring should be evaluated based on sufficient empirical data, which does not yet exist.

A serious concern presents itself: Do domestic courts enhance the rule of law at the domestic level but simultaneously damage the rule of law at the international level, or vice versa? The situation is likely. As a matter of fact, the “reclaiming [of] democracy” suggested by Benvenisti, may be perhaps used by states to deny or derogate international obligations that they have entered into. Given that rule of law at the international level is justified somewhat differently from that at the domestic level²⁹—for instance, legal flexibility merits more consideration for rule of law in a horizontal (international) society more than that for the rule of law in a vertical (domestic) society, the maintenance of domestic rule of law may be used as a disguise to compromise the international rule of law.

Complicating this analysis, since the 1990s, transnational judicial dialogues and cooperation have emerged. According to Slaughter, this trend constitutes a part of the process of the disaggregation of the state, which leads to a “New World Order.”³⁰ Judges in one country may “judge” their peer judges in another country by referring to each other’s decisions.³¹ They also conduct “judicial negotiation,” especially on global bankruptcies.³² More generally, the face-to-face meetings among judges from different countries serve to cross-pollinate their ideas and conceptions of law.³³ According to Benvenisti and Downs, transnational cooperation among courts may be inspired by their common pursuit, for instance, of constraining or supporting governmental activities, or may be done to protect their own judicial independence more effectively.³⁴ Arguably, transnational judicial dialogue and cooperation represent a new approach by which national courts affect the international legal order and domestic legal order. However, since national courts “remain sensitive to the national interest,”³⁵

²⁷ Eyal Benvenisti and George W. Downs, at 10.

²⁸ Eyal Benvenisti (2008), at 242.

²⁹ As to the externalization of the concept of the rule of law from domestic arena to international arena. See Sharon Weill, at 9–10. See also 60/1. 2005 World Summit Outcome, paras. 11 and 134.

³⁰ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) Chapter 2.

³¹ *Id.*, at 91.

³² *Id.*, at 94.

³³ *Id.*, at 96–103.

³⁴ Eyal Benvenisti and George W. Downs, at 117, 143–144.

³⁵ *Id.*, at 145.

transnational judicial dialogues and cooperation may further increase the asymmetry among different countries in shaping international law.

3. Factors Affecting the Application of International Law in Chinese Courts

In accordance with general international law, states have great discretion to decide issues like which government organ is more relied on, and which method they prefer to employ to enforce their international legal obligations. This means that, in addition to the international legal rules to be applied, there are domestic variants, for instance, the country's legal culture,³⁶ that affect the actual application of international law in domestic courts. It is therefore necessary to investigate these domestic variants, which can uncover the context and dynamics underlying how Chinese judges treat international law. Three major categories of factors are explored in turn: strategic factor, constitutional factor, and professional factor.

3.1 Strategic Factor

The strategic factor refers to the national strategy, including foreign strategy, that a state has established to pursue its long-term state interests. The strategic factor yields prominent and lasting influence on the activities of state organs, including domestic courts. In particular, it often requires the coordination and cooperation among different state organs. Importantly, some theorists in Western countries have begun to recognize that serious discord among state organs may hinder a state from, among other things, making and enforcing its long-term national strategy.³⁷

Clearly, the national strategy of China in the past forty years has been to seek the restoration and expansion of economic power as soon as possible. As a result, political freedom and social justice were given less importance. This is the core of the "Beijing Consensus"³⁸ In the twenty-first century, a new national strategy has been established with a goal to rise as a new great power, which

³⁶ See generally Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) Chapter 12.

³⁷ See generally Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Strauss and Giroux, 2014).

³⁸ See Joshua Cooper Ramo, *The Beijing Consensus* (London: Foreign Policy Center, 2004); Bradley Klein, Democracy Optional: China and the Developing World's Challenge to the Washington Consensus, 22 *UCLA Pac. Basin L.J.* 89 (2004).

was successively labeled as the “peaceful rise” or “peaceful development” under the leadership of President Hu Jintao and the “Chinese Dream of National Rejuvenation” under the leadership of President Xi Jinping.

Chinese courts, together with other state organs, are highly sensitive to China’s national strategy. For instance, shortly after the BRI was established as a national strategy,³⁹ the SPC took measures to support this strategic project. For instance, the SPC, in a judicial instrument on the BRI adopted in 2015 required that courts shall “effectively serve and guarantee the successful implementation of BRI.”⁴⁰ To that end, courts were instructed to continually increase their capability of correctly applying international legal rules and thus improve “internationally judicial credibility.”⁴¹ Remarkably, that judicial instrument requires that courts “strictly abide by the VCLT” by fully incorporating the principle and methods provided in Article 31, Paragraph 1 of the VCLT with the aim of improving “the consistency, stability and predictability of application of international treaties and usages in the adjudication of disputes.”⁴² It is likely quite rare for the supreme courts of other countries to direct the judicial polity toward treaty interpretation in such a firmly supportive manner.

Another national strategy that China has established is to develop itself into a sea power, which is becoming more and more important as the maritime disputes between China and several neighboring countries intensify. Accordingly, the SPC adopted a judicial instrument with the aim of providing “effective judicial guarantee for . . . the building of the sea power.”⁴³ Accordingly, that instrument, requires that China’s courts “strictly enforce treaty obligations, correctly understand and apply international treaties and customs.”⁴⁴ In 2016, the SPC adopted two Judicial Interpretations (*shi fa jie shi shi*) in relation to the exercise of jurisdiction in Waters under Chinese Jurisdiction.⁴⁵ They are

³⁹ National Development and Reform Commission (NDRC), Ministry of Commerce (MOC) and MFA, Vision and Actions on Jointly Building the Silk Road Economic Belt and the 21st-Century Maritime Silk Road (March 2015), Preamble.

⁴⁰ SPC, Some Opinions on the Provision of Judicial Service and Guarantees to BRI (June 16, 2015).

⁴¹ *Id.*

⁴² *Id.*

⁴³ SPC, Opinions Concerning Comprehensively Enhance the High-Quality Strategy of Adjudication of Foreign-related Commercial and Maritime Disputes and Provide Judicial Guarantee for the Building of Open Economic System and Sea Power (July 14, 2015) (hereinafter “Opinions of Judicial Guarantee (2015)”).

⁴⁴ *Id.*

⁴⁵ SPC, Rules on the Relevant Issues Concerning the Adjudication of Cases Occurring in the Waters under Chinese Jurisdiction (First), adopted on December 28, 2015, and entered into effect on August 2, 2016; Rules on the Relevant Issues Concerning the Adjudication of Cases Occurring in the Waters under Chinese Jurisdiction (Second), *Fashi* (2016) 17, adopted on May 9 and entered into effect on August 2, 2016.

aimed to protect Chinese maritime rights and interests,⁴⁶ including those in South China Sea.⁴⁷ Furthermore, in delivering the annual report to the NPC in 2016, Zhou Qiang, chief justice and president of the SPC, reported that Chinese courts “firmly protect national sovereignty, maritime rights and interests and other core interests.”⁴⁸ In particular, Chief Justice Zhou announced that China would endeavor to construct an international maritime judicial center.⁴⁹ Arguably, this project implies that Chinese courts will be expected to take a greater role in protecting Chinese maritime rights and interests and, more generally, enhancing China’s rise as a sea power.⁵⁰

As suggested later, it is their unique constitutional status that makes Chinese courts more sensitive to national strategy concerns than courts in many other countries.

3.2 Constitutional Factor

The constitutional factor refers to how China’s constitution treats international law in its domestic legal order and defines the role of the judiciary in China.

3.2.1 Constitutional Status of International Law in China

In many domestic legal systems, the constitution determines international law’s status in the domestic legal system. China’s constitution, however, is silent in this regard.

Two straightforward explanations can be presented for China’s silence regarding international law in its constitution. The first explanation is the influence of Soviet international legal theory and practice. The Soviet states once claimed that international law was manipulated by a handful of Western powers. As a result, they never mentioned international law in their constitutions.

⁴⁶ Zhang Wenguang, Improve the Rule of Law at Sea and Protect National Interests, *People’s Courts Daily*, August 3, 2016, at 2.

⁴⁷ Li Tiansheng, “Fully Recognize the Significance of Enhancing Maritime Judicial Sovereignty,” available at <http://www.chinacourt.org/article/detail/2016/08/id/2048089.shtml> (last visited May 15, 2019).

⁴⁸ Zhou Qiang, Working Report of the SPC—4th Session of the 12th NPC (March 13, 2016) (hereinafter “The Working Report of the SPC (2016)”), available at <https://www.chinacourt.org/article/detail/2016/03/id/1825026.shtml> (last visited May 15, 2019).

⁴⁹ Zhou Qiang, The Working Report of the SPC (2016), *id.*

⁵⁰ See, e.g., Huirong Liu, On the Significance of the Sea-related Judicial Interpretations by the SPC from the perspective of the Law of the Sea, 2 (2017) *J. Ocean University of China* 1 (2017) (in Chinese); Jesse Johnson, “China to create ‘international maritime judicial center’ amid rising sea tensions,” available at <https://www.japantimes.co.jp/news/2016/03/13/asia-pacific/china-create-international-maritime-judicial-center-amid-rising-sea-tensions/#.WxZNRpZuLIU>; Tiffany Ap, “China to create maritime judicial center as South China Sea tensions simmer,” available at <https://edition.cnn.com/2016/03/12/asia/china-maritime-judicial-center/index.html> (last visited May 15, 2019).

China's decision to base its Constitution (1954) on the Soviet Constitution of 1936 partly explains why China's constitution is silent on international law. The second explanation lies within China's history. After the First Opium War (1839–1842), China was forced to sign many unequal treaties. This experience, known in China as the “Century of Humiliation,” led China to treat international law with hostility well into the twentieth century.⁵¹

Almost all Chinese international lawyers agree that the role of international law in the Chinese legal order should be clarified at the constitutional level,⁵² but the government has yet to include such clarification in its agenda. In 2014, during debates on the amendment of the Legislation Law (2000), some members of the NPCSC argued that the amended Legislation Law should include provisions clarifying the status of treaties in the domestic legal system.⁵³ Other NPCSC members, however, suggested that the inclusion of these provisions would be inappropriate.⁵⁴ The final version of the law, promulgated in March 2015, does not include any provisions clarifying the status of treaties in the Chinese domestic legal system.⁵⁵

China's constitutional silence regarding international law has led to the uncertain and fragmented status of international law in the Chinese legal order. This issue is currently decided in individual legislations on a case-by-case basis. For instance, Article 72 of the Administrative Procedural Law (1990) (APL (1990)) provides that “[i]f an international treaty concluded or acceded to by the People's Republic of China contains provisions different from those found in this law, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.” Those provisions of international law in laws like the APL (1990) refer to “treaties” only and do not include other sources of international law—for instance, international customs or decisions of international organizations. In recent years, however, some ministry-level governmental organs, such as the MFA, have adopted a number of instruments requiring that the relevant governmental organs and private entities implement the sanction decisions

⁵¹ Tiejia Wang, *International Law in China: Historical and Contemporary Perspectives*, 221 *Recueil des Cours* 195 (1990) 250–262.

⁵² See Xiaoqing Zhu and Lie Huang eds., *Relations between International Treaties and Domestic Law* (Beijing: World Affairs Press, 2000) 17, 40, 159 (in Chinese).

⁵³ Liping Chen, *The Application of Treaties in China Should Be Clarified*, *Legal Daily* (November 24, 2014), available at http://www.npc.gov.cn/npc/cwhhy/12jcw/2014-11/24/content_1886934.htm.

⁵⁴ *Id.*

⁵⁵ China's Law on Legislation (promulgated by the NPC, March 15, 2000, effective July 1, 2000, amended by the NPCSC, March 13, 2015).

approved by the UN Security Council. For instance, the MFA, in 2001, issued a note requiring the implementation of Resolution 1267 and Resolution 1333 of the UN Security Council.⁵⁶ More importantly, the aforementioned omission in the constitution discourages many secondary laws from defining the status of international law. As a matter of fact, many Chinese laws do not have provisions relating to international law, for instance, the Choice of Law for Foreign-Related Civil Relations enacted in 2010.⁵⁷ Such an omission might further lead to the removal of currently existing provisions related to international law from a particular domestic law. For instance, Article 72 of the APL (1990) was repealed in 2015 without any explanation.⁵⁸

Furthermore, China's general constitutional and statutory ambivalence toward international law has discouraged judges from applying it. According to a Judicial Interpretation issued by the SPC in 2009, the normative instruments that can be invoked as the basis for "legal conclusions" do not include international law. Instead, international law belongs to a category of "other normative instruments," which may be merely invoked to conduct "legal reasoning."⁵⁹ Although some judges still explicitly invoke specific treaty provisions as the basis for legal conclusions that they make, many judges do not, even though their legal reasoning may rely heavily on the relevant treaty provisions.

Examined from another angle, however, this fragmentation and unpredictability also creates flexibility. For a state like China, which is in the midst of rising within a rapidly changing world, flexibility often is more important than formal commitment stability. Flexibility grants China a greater margin to pursue public policy. Also, in a sense, China's approach to the domestic application of international law accords with the trend toward the incorporation of international law in domestic legal systems in a flexible manner in order to balance concerns regarding the effectiveness of international law with beliefs in the greater legitimacy and normative priority of domestic governance.⁶⁰

⁵⁶ See, e.g., MFA, Note on Imposing Financial Sanctions towards the Relevant Individuals and Entities in Order to Implement Resolution 1267 and Resolution 1333 of the Security Council (October 17, 2001).

⁵⁷ Ironically, such a provision was included in a Judicial Interpretation issued by the SPC in 2012. See SPC, Interpretation (First) on Certain Issues Concerning the Application of the Choice of Law for Foreign-Related Civil Relations of the People's Republic of China, December 2012, art. 4.

⁵⁸ Similarly, Article 46 of the Environmental Protection Law (1989), which provides that "[i]f an international treaty related to the environmental protection, which have been concluded or acceded to by the People's Republic of China, contains provisions different from those found in Chinese laws, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations," was repealed in its amendment in 2014. See the Environmental Protection Law (1989, as amended in 2014).

⁵⁹ SPC, Rules on the Invocation by People's Courts of Normative Instruments Including Law and Regulations in the Adjudicatory Decisions, July 3, 2009, art. 6.

⁶⁰ See Pierre-Hugues Verdier and Mila Versteeg, International Law in National Legal Systems: An Empirical Investigation, 109 *Am. J. Int'l L.* 514 (2015) 523.

3.2.2 Constitutional Status of the Judiciary in China

China has a constitutional framework distinct from those in many Western countries, which stress checks and balances, especially between the executive branch and the judicial branch. Chinese leaders always deny any possibility of establishing a system of separation of judicial, executive, and legislative powers in China.⁶¹ Rather, they firmly defend what is practiced in China as “the system of the People’s Congress,” under which the state power “is invested to the People’s Congress.” Different state organs, including courts, “are created by, responsible for, and supervised by” the People’s Congress. State organs with different authorities are “under the leadership of the CCP and implement the CCP’s policies and the Constitution and the laws . . . are not the checks and balances in Western countries.”⁶² Nevertheless, it does not mean that there is no resemblance between the Chinese constitutional framework and those in other countries like the U.S.

Indeed, Chinese courts, in accordance with China’s constitution, “exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organs and individuals.”⁶³ The Law of Organization of Courts (2006) and the Judges Law (2001) have the same provisions.⁶⁴ As a matter of fact, Chinese courts often make judgments unfavorable to the executive branch. However, judicial power is substantially constrained in China. For instance, the NPCSC has the power to “supervise” the judicial administration of the SPC;⁶⁵ courts are not allowed to adjudicate disputes by invoking constitutional provisions;⁶⁶ courts also have no power to review laws enacted by the ministry-level governmental organs, the State Council, and the NPC, including NPCSC.⁶⁷ Furthermore, Chinese courts are required, explicitly or implicitly, to “support” rather than “supervise” the executive branch in practice.⁶⁸ More generally, the exercise of judicial power is under close surveillance by the CCP.⁶⁹

⁶¹ See, e.g., *Selected Works of Deng Xiaoping* (Vol. 3), at 187.

⁶² “Wu Bangguo: We absolutely do not copy the multi-party system and checks and balanced practice in the Western countries,” available at <http://news.sina.com.cn/c/2009-03-10/060115283341s.shtml> (last visited May 16, 2019).

⁶³ Constitution (1982, amended in 2004), art. 126.

⁶⁴ Law of Organization of Courts (1979, amended in 2006), art. 4; Judge Law (1995, amended in 2001), art. 8(2).

⁶⁵ Constitution (1982, as amended in 2004), art. 67(5). See also arts. 3, 92, 96, 111, 128, 133.

⁶⁶ See generally Tian Lei, In Search of China’s Marbury: Why the Judicialization Campaign Failed and How to Revive Constitutionalism in China, 4 *Peking U. J. Legal Stud.* 139 (2013).

⁶⁷ APL (1990, as amended in 2017), art. 5.

⁶⁸ Weidong Ji, The Judicial Reform in China: The Status Quo and Future Directions, 20 *Ind. J. Global Legal Stud.* 185 (2013) 196. See generally Meng Hou, *A Study on the Supreme People’s Court of China* (Beijing: Law Press, 2007) (in Chinese).

⁶⁹ Chinese courts shall “protect the regimes of dictatorship of the proletariat.” Law of Organization of Courts (1979, as amended in 2006), art. 3(1).

According to the conventional wisdom of the rule of law in the Western world, there is no meaningful judiciary integrity in China.⁷⁰ While the extent to which judicial independence exists in China is debatable, there is a consensus that judicial independence in China needs to be improved.⁷¹ According to Nollkaemper, the lack of judicial independence is a major cause for the failure of Chinese courts to secure China's compliance with international law.⁷²

Regardless of the international debate on their position and power, Chinese judges themselves seek to increase their role in the constitutional framework. For instance, E'xiang Wang, while acting as a vice president of the SPC, suggested that the role of Chinese courts in foreign relations should be enhanced. For instance, courts should be empowered to decide whether a treaty is self-executing or non-self-executing.⁷³

3.3 Professional Factor

Good judicial administration is preconditioned on judges with highly professional competence. Unfortunately, the Chinese judiciary has long been notorious for the lack of professionally competent judges. Prior to 1995 when the Judge Law was adopted, there were no compulsory qualifications required to be a judge in China. Officials from the executive organs, the CCP branches, and military units were often appointed as judges. Most judges did not have a law degree or sufficient legal knowledge.⁷⁴ The Judge Law (1995) for the first time provided that judges must be appointed from those receiving education at law schools or receiving education at non-law schools but having legal knowledge. Those incumbent judges who did not meet such a requirement had to receive legal training.⁷⁵ The Judge Law (2001) provides more strict qualifications. According to this law, any person who would be appointed as a judge must receive a bachelor degree in law, or a non-law bachelor degree but have legal knowledge. More importantly, all would-be judges must pass the Unified National Judicial Examination (UNJE). Still, those incumbent judges who fail to meet such requirements can qualify themselves by receiving legal training.⁷⁶ Overall, poor professional competence has often resulted

⁷⁰ Randall Peerenboom, at 280.

⁷¹ See Randall Peerenboom ed., at Chapters 2, 4, 5, and 6.

⁷² André Nollkaemper, at 53–55.

⁷³ E'xiang Wang ed., *A Study on the Relationship between International Law and National Law* (Beijing: Beijing University Press, 2011) 476–481 (in Chinese).

⁷⁴ Randall Peerenboom, at 290.

⁷⁵ Judge Law (1995), art. 9.

⁷⁶ Judge Law (1995, as amended in 2001), arts. 9, 12.

in wrongly adjudicated cases, which seriously damages the legitimacy of the judiciary.⁷⁷

Application of international law is especially demanding for Chinese judges. First, language is a big obstacle for most Chinese judges. Many treaties that China has concluded either have no Chinese authentic texts or stipulate that, in case any divergence happens, English authentic texts prevail over Chinese authentic texts. Most Chinese judges as non-English speakers do not have a firm enough command of English to ensure a correct understanding of treaty provisions.⁷⁸ Second, the identification and interpretation of international legal rules is a complicated process.⁷⁹ It needs practical application much more than understanding of abstract legal theories. However, Chinese law school students were traditionally taught what international law was, not how international law was used. As a result, although some Chinese judges know international legal theories well, they may find that the international legal theories they learned at law school are of little help in applying international law. Third, the fact that China, generally speaking, adopts the transformation method rather than automatic incorporation to enforce its international legal obligations discourages Chinese judges from learning international law.⁸⁰

The lack of sufficient legal knowledge of international law is more even serious in the vast middle and western areas of China. It has been suggested that many judges in those areas do not even consider international law to be “law” and believe they should apply domestic law only.⁸¹ In practice, nearly all the application of international law happens in the eastern part of China, especially in Shanghai, Beijing, and Guangdong, and judges in the western area, for instance, Xinjiang and Yunan, hardly have any experience in applying treaties.⁸²

The SPC has taken many measures to improve the competence of judges.⁸³ In particular, in 2015, the SPC proposed a variety of important measures, for instance, the establishment of Judicial Selection Committees (JSC) at national and provincial levels, more appointments of attorneys and legal scholars as judges,

⁷⁷ Randall Peerenboom, at 290.

⁷⁸ Qingjiang Kong, International Law Teaching in China: Emerging in a Pedagogical Reform or Embracing Professionalism and Internationalization?, 12 *Cambridge J. China Stud.* 11 (2017) 20.

⁷⁹ See ICJ Statute, art. 38(1); VCLT (1969), arts. 31, 32.

⁸⁰ As noted by Rosalyn Higgins, however, this is a common phenomenon in many countries that embrace the dualist approach to international law. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 206.

⁸¹ Zhijing Yu and Jian Li, On the Dilemma and Way out of Judicial Application of Treaties in China, 8 *Pol. & L.* 138 (2016) 142 (in Chinese).

⁸² Jing Du, On the Application of International Treaties by Courts in Shanghai 1990–2012, 2 *Theory Learning* 82 (2015) (in Chinese); Yu Zhijing and Li Jian, at 142.

⁸³ Randall Peerenboom, at 292–293.

and more cooperation with law schools.⁸⁴ In particular, the SPC required that judges improve their knowledge of international law.⁸⁵

4. Methods of Application of International Law in Chinese Courts

Generally speaking, international law requires a state to enforce the legal obligations imposed on it, leaving issues such as who is authorized to perform those obligations and how to perform them, to be decided by the state. For instance, the VCLT only provides that a contracting state perform a treaty that has come into force for it “in good faith,”⁸⁶ leaving the methods enforcing the treaty to be decided by that contracting state.

There are three methods to enforce international law at the domestic level: automatic incorporation, transformation, and consistent interpretation. The judicial power that national courts exercise varies under each method.

4.1 Automatic Incorporation

Automatic incorporation empowers courts to give effect to international law in the absence of implementing legislation.⁸⁷ In China, more than one hundred provisions in nearly eighty laws passed between 1978 and 2004 embrace automatic incorporation to varying extents.⁸⁸

This flexibility regarding the usage of automatic incorporation, when mandated by specific legislation rather than a constitutional provision, makes sense in the context of the rise of China. For example, the maintenance of executive authority, a core element of the Beijing Consensus, tends not to support the automatic incorporation of international law. But, since automatic incorporation can have little effect on executive authority in cases where international legal rules solely govern the legal relations between private parties, no relative authority concerns arise in these contexts, and therefore automatic incorporation is sometimes used.

⁸⁴ SPC, Opinion on the Comprehensively Deepening the Reform in People's Courts—Outline of the Fourth Five-Year Reform (2014–2018), February 2015.

⁸⁵ See, e.g., SPC, Notice of the Supreme People's Court on Several Issues Concerning the Trial and Enforcement of Foreign-Related Civil and Commercial Cases (April 17, 2000).

⁸⁶ VCLT, art. 26.

⁸⁷ André Nollkaemper, at 73.

⁸⁸ Wang Yong, *Fundamental Theory of the Application of Treaties in China* (Beijing: Law Press, 2007) 146 (in Chinese).

In this regard, a good example is Article 142 of the General Principles of Civil Law (GPCL). Article 142 provides:

If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.⁸⁹

The GPCL serves to regulate civil and commercial affairs between private entities, which have little to do with executive authority. The significance of this provision lies in its reference to the plural "civil laws" as opposed to the singular "civil law." In such context, it should be interpreted to apply not only to the GPCL itself but also to all laws classified as "civil laws."⁹⁰

Interestingly, Article 72 of the APL of 1990 also provided that "[i]f an international treaty concluded or acceded to by the People's Republic of China contains provisions different from those found in this law, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."⁹¹ This version of Article 72 of the APL embraced automatic incorporation, which means Chinese courts should not be prevented from giving direct effect to international legal commitments, such as the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) and the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

However, as noted, the NPC repealed Article 72 as a legal basis for automatic incorporation in the 2014 amendments to the APL, which was the first time China repealed provisions regarding international law from its domestic laws. According to the amended APL, Chinese courts must exclusively apply national laws to decide claims against executive organs and can merely invoke international law for interpretative purposes.⁹² Although it is too early to argue that China has returned to its former hostile treatment of international law, the repeal is consistent with a conservative judicial policy toward international law acting as a constraint on public authority. Whatever the reasons for repeal, the repeal makes it more difficult for China to honor its treaty obligations.

⁸⁹ General Principles of Civil Law (promulgated by the Nat'l People's Cong., April 12, 1986, effective January 1, 1987). Unless otherwise indicated, translations of Chinese law provisions are not official translations.

⁹⁰ Wang Tieya, at 332.

⁹¹ APL (1990), art. 72.

⁹² See APL (1990, as amended in 2014), art. 63.

For instance, all Chinese investment treaties allow foreign investors to bring lawsuits against the Chinese government in Chinese courts,⁹³ but the amended APL prevents Chinese courts from deciding disputes based on those treaties.

Presumably, there are three reasons for the repeal of Article 72 from the APL (1990). First, the NPC may have eliminated Article 72 because it is rarely invoked in practice and therefore viewed as redundant. Second, the former Article 72 of the APL(1990) had not been intended to mean that China would be willing to place its executive authority under close judicial surveillance simply by reference to international law. Thus, the NPC may have eliminated Article 72 to align the legal text with the long-prevailing intention of the law. The main consideration, however, is likely that the NPC intends to shield China's executive authority from a potentially increasing number of future judicial challenges. China's leaders might be concerned with the possibility that judicial reform, combined with China's ratification of a growing number of international treaties, will empower the courts to challenge executive authority by applying international law. Repealing Article 72 responds to these concerns regarding the implication of growing judicial independence in China. This explanation suggests that increasing judicial independence, combined with the conclusion of more treaties that grant rights to individuals vis-à-vis the state, could prompt further constraints on the automatic application of such treaties by Chinese courts.

4.2 Transformation

Transformation requires legislatures to act on each specific international commitment before courts can enforce that specific international law.⁹⁴ While China continues to have many laws that adopt automatic incorporation, transformation is the most common way for the country to implement its treaty obligations.⁹⁵ However, transformation as a systematic technique only began to be taken seriously upon China's accession to the WTO in 2001. At that time, most Chinese lawyers proposed that Chinese courts be allowed to directly apply at least some WTO rules.⁹⁶ In 2002, the SPC effectively rejected these proposals with the promulgation of its Regulations on Issues Concerning

⁹³ See Wenhua Shan, *The Legal Framework of EU-China Investment Relations: A Critical Appraisal* (Oxford: Hart Publishing, 2005) 210.

⁹⁴ *Id.* at 77.

⁹⁵ Xue Hanqin and Jin Qian, International Treaties in the Chinese Domestic Legal System, 8 *Chinese J. Int'l L.* 299 (2009) 308.

⁹⁶ See Congyan Cai, *Private Structural Participation in the Multilateral Trade System* (Beijing: Beijing University Press, 2007) 265–268 (in Chinese).

the Trial of Administrative Cases Relating to International Trade (Trade Case Regulations).⁹⁷ Judge Li Guoguang, the SPC's deputy president at that time, clarified that WTO rules could not be directly applied in disputes between private parties and executive organs.⁹⁸ This means that private parties cannot invoke WTO rules before courts, and courts cannot directly use WTO rules as the basis for adjudication,⁹⁹ which, of course, is required for other WTO Members. In the *Shenzhen Chengjie'er Trade Co., Ltd. Case*, the respondent, Tianjin Customs District, detained the imported goods of the plaintiff, Chengjie'er.¹⁰⁰ The plaintiff argued that the prolonged detention breached Article 55 of the TRIPS Agreement.¹⁰¹ A Tianjin court decided that, according to the Trade Case Regulations, Chinese laws should be applied, rather than the TRIPS Agreement.¹⁰² In *Longines Co. v. Trademark Review & Adjudication Board*, a Beijing court affirmed that the defendant was justified in not relying directly in its decision upon the TRIPS Agreement because its provisions were "included in the current Trademark Law."¹⁰³

Generally, transformation allows China to deal with treaty commitments on a case-by-case basis and to water down those commitments that may grant rights to individuals vis-à-vis the state.¹⁰⁴

4.3 Consistent Interpretation

Even in the absence of legislative action, domestic courts in practice can apply international law by interpreting national law to be in conformity with an international obligation (the principle of consistent interpretation).¹⁰⁵ Chinese courts sometimes employ the principle of consistent interpretation when considering domestic laws that do not explicitly provide for it. For instance, in *Nanning XX Service LLC v. Nanning XX Bureau*, there was disagreement regarding the

⁹⁷ SPC, Regulations of the Supreme People's Court on Issues Concerning the Trial of Administrative Cases Relating to International Trade (Promulgated by the Sup. People's Ct., Aug. 27, 2002, effective Oct. 1, 2002) Sup. People's Ct. Gaz. 165 (China).

⁹⁸ See Li Guoguang, Speech at the Press Conference on the Regulations of the Supreme People's Court on Issues Concerning the Trial of Administrative Cases Relating to International Trade, August 29, 2002.

⁹⁹ *Id.*

¹⁰⁰ Deyong Shen ed., *Selection of Cases of People's Courts* (Beijing: People's Courts Press, 2013) 365–368 (in Chinese).

¹⁰¹ *Id.* at 366.

¹⁰² *Id.* at 368.

¹⁰³ Longqinbiao Co. Ltd. v. Trademark Review & Adjudication Bd., Beijing Interm. People's Ct. Aug. 14, 2012.

¹⁰⁴ Admittedly, the existing surveillance mechanisms of many, if not most, treaties are not effective enough to prompt states parties to incorporate treaties into their domestic legal systems.

¹⁰⁵ André Nollkaemper, at 73–81.

meaning of “workplace.”¹⁰⁶ China’s Work Injury Insurance Regulations of 2010 failed to provide a definition.¹⁰⁷ The court decided that the regulations should be interpreted in conformity with Article 3(c) of the Convention Concerning Occupational Safety and Health and the Working Environment (to which China is a contracting party), which provides that “the term workplace covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer.”¹⁰⁸

Consistent interpretation might be used in a more subtle manner as well. Searches on Pkulaw.cn (bei da fa bao), a leading legal database in China, reveal that international law is often mentioned in case reviews written by judges who are colleagues of judges hearing the cases. Therefore, it might be assumed that, while the principle of seeking to make an interpretation consistent with international law does not appear so much in judgments, it is employed in judicial reasoning.

Most directly, the principle of consistent interpretation has been used in relation to China’s WTO commitments. While excluding the direct effect of WTO rules, the Trade Case Regulations, already discussed, utilize the principle of consistent interpretation. While most states do not provide an explicit mandate for the principle in their domestic law,¹⁰⁹ China is one of the few that does. According to Article 9 of the Trade Case Regulations, “[i]f there are two or more reasonable interpretations for a provision of the law or administrative regulation applied by a people’s court in the hearing of an international trade administrative case, and among which one interpretation is consistent with the relevant provisions of the international treaty that the PRC concluded or entered into, such interpretation shall be chosen, unless China has made reservation to the provisions.”¹¹⁰ In *Chongqing Zhengtong Pharmaceutical Co. Ltd. v. Trademark Review & Adjudication Board*, the SPC referred to Article 9 for the first time.¹¹¹ It held that the “agent” in Article 15 of China’s Trademark Law should be interpreted in accordance with “agent” and “representative” in Article 6 (7) of the Paris Convention on the Protection of Industrial Property (1883).¹¹² The Trade Case Regulations stand alone as the only Chinese law to explicitly mandate the principle of consistent interpretation. This shows that China views

¹⁰⁶ Nanning XX Serv. LLC. v. Nanning XX Bureau, Nanning Dist. People’s Ct., Jan. 10, 2012.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ André Nollkaemper, at 147.

¹¹⁰ Regulations of the Supreme People’s Court on Issues Concerning the Trial of Administrative Cases Relating to International Trade, art. 9.

¹¹¹ *Chongqing Zhengtong Pharm. Co., Ltd. & Trademark Review & Adjudication Bd. of the State Admin. for Indus. & Commerce v. Sichuan Huashu Veterinary Pharm. Co., Ltd.*, available at http://www.pkulaw.cn/case/PFnl_117526660.html (last visited May 16, 2019).

¹¹² *Id.*

the WTO regime as sufficiently important to establish this sophisticated and unique judicial policy.

Obviously, the principle of consistent interpretation can apply to all international legal rules. Unfortunately, the SPC has not explicitly established consistent interpretation as a general principle of interpretation. This reduces the opportunities Chinese courts have to explain international law.

5. Structure

Chinese domestic courts' approach toward international law is sensitive to the relationship that the international legal rule seeks to govern. For present purposes, four different categories of these relationships may be highlighted (although this is not, of course, an exhaustive or even a standard categorization). The first are rules of immunity, which govern the relationship between domestic individuals and foreign states and their agents. The second are rules that grant rights to individuals vis-à-vis states, most prominently through human rights treaties. The third category of rules are those in which international law extends states' jurisdictional authority over a new or expanded class of subjects or situations, for example, through rules of universal jurisdiction in the case of piracy. Last are international rules governing the relations between individuals (i.e., relations in which the state is not directly involved at all). This categorization aids in exploring why Chinese domestic courts embrace certain kinds of international legal rules and are reluctant to apply others.

5.1 Rules of Immunity

The adoption of the State Immunity Convention in 2004 indicates that there is a global consensus that domestic courts may play a larger role in foreign relations. Domestic courts in some jurisdictions have been inclined to challenge the traditional policy of deference to the executive authority even further. For example, in the *Grundlagenvertrag* case, a Greek court of first impression decided that Germany could not invoke immunity for the killing and rape committed by German SS soldiers in a Greek village in 1944 because they violated a *jus cogens* norm.¹¹³ The Areios Pagos, the supreme court of Greece, affirmed

¹¹³ See Kerstin Bartsch and Björn Elberling, *Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision, 4 *German L.J.* 477 (2003) 478–479. *Jus cogens* norms are peremptory norms from which no derogation is permissible. See Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) 8.

the lower court's decision.¹¹⁴ Upon the initiation of enforcement proceedings, however, the Greek minister of justice refused to seize German property.¹¹⁵ The Greek Special Highest Court, which is empowered to settle issues of international law, held that Germany's immunity extended to tort suits in all Greek civil courts.¹¹⁶ Some Greek claimants initiated enforcement proceedings in Italy. Later, Germany sued Italy at the International Court of Justice. The Court held that Italy violated Germany's sovereign immunity under international law.¹¹⁷ Similar controversies have arisen in other jurisdictions (e.g., Spain¹¹⁸). In short, while there is a trend that domestic courts rule more aggressively than before in relation to state immunity, substantial disagreements remain. Therefore, it seems advisable that domestic courts should not go too far.

Absolute state immunity has long been China's policy. Chinese courts have neither exercised jurisdiction over acts of foreign states nor enforced any decisions involving foreign states.¹¹⁹ China has also effectively relied upon state immunity to avoid the exercise of jurisdiction in foreign courts, such as in the famous case of *Jackson v. People's Republic of China*.¹²⁰

On September 14, 2005, China signed the State Immunity Convention,¹²¹ signaling that the country would shift its policy from absolute immunity to relative immunity. Under the new relative immunity policy, Chinese courts apply international law to determine the extent of a state's immunity. Since China has not yet ratified the Convention, it still strategically uses its traditional policy of absolute state immunity when it finds itself being sued in foreign courts (e.g., *Morris v. People's Republic of China*¹²²) or finds the issue raised in courts such as those of Hong Kong (e.g., *Democratic Republic of the Congo v. FH Hemisphere Associates*¹²³).

Furthermore, issues such as doubts regarding the professional capability of judges and the lack of enabling law may lead Chinese courts to continue for a

¹¹⁴ Bartsch and Elberling, at 480.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 481.

¹¹⁷ Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), 2012 ICJ REP. 37, 39 (Feb. 3).

¹¹⁸ See Mugambi Jouet, Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond, 35 *Ga. J. Int'l & Comp. L.* 495 (2007).

¹¹⁹ Xue Hanqin, Chinese Contemporary Perspectives on International Law: History, Culture and International Law, 355 *Recueil des Cours* 41 (2011) 100–101.

¹²⁰ *Id.* at 101–02; *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986); see also Jill A. Sgro, China's Stance on Sovereign Immunity, 22 *Colum. J. Transnat'l L.* 101 (1983).

¹²¹ United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, U.N. Doc. A/59/508.

¹²² See Reply Mem. of Law in Further Supp. of China's Mot. to Dismiss, *Morris v. People's Republic of China*, 478 F. Supp. 2d 561 (S.D.N.Y. 2007), 2006 WL 2581974.

¹²³ *Democratic Republic of the Congo v. FG Hemisphere Associates*, [2011] 14 H.K.C.F.A.R. 95 (C.F.A.).

time to apply absolute state immunity. However, Chinese courts will almost certainly hear claims against foreign states sooner or later. Chinese private parties have expanded tremendously their engagements with foreign states as China rises as a great power. Chinese private parties increasingly invest abroad, trade with foreign entities, and are employed by (or contract with) foreign diplomatic bodies.¹²⁴ Many reports show that the officials of host governments often misuse their authority and infringe upon the rights of those Chinese who live and work abroad.¹²⁵ In 2014, China declared a new state strategy of “protecting the legal rights and interests of Chinese nationals and corporations abroad in accordance with the law.”¹²⁶ This policy has two features. First, it attaches more importance to increasingly expanding private interests, which constitute an indispensable component of China’s rise. Second, it puts a greater emphasis on legal rather than diplomatic means, which is aimed at depoliticizing relations between Chinese individuals and foreign states.

In China, a contentious issue regarding state immunity is whether a foreign state could be sued in domestic courts for activities that infringe upon *jus cogens* norms. A number of Chinese international lawyers have suggested that if Chinese courts were to sue Japan for its violations of *jus cogens* norms during World War II, such as the use of lethal bacteria and indiscriminate bombing, Japan could not invoke state immunity.¹²⁷ Chinese individuals have initiated several such lawsuits against Japan. For example, in September 2012, some Chinese victims of the Chongqing Grand Bombing, the bombing operations conducted by Japan during World War II, sought to bring claims against Japan before the Chongqing High People’s Court.¹²⁸ Similarly, in March 2014, a group of forced laborers and their descendants filed cases against Japan and several Japanese companies before the Tangshan Intermediate People’s Court.¹²⁹ In their complaints,¹³⁰ plaintiffs in both cases argue that Japan cannot invoke state

¹²⁴ Dahai Qi, State Immunity, China and Its Shifting Position, 7 *Chinese J. Int’l L.* 307 (2008) 327.

¹²⁵ “Why Are Chinese Infringed Abroad?” *JFDaily.com* (China), available at <http://bbs.tianya.cn/post-free-4866819-1.shtml> (last visited May 16, 2019).

¹²⁶ See CCP Central Committee Decision on Major Issues Concerning Promoting the Rule of Law, Part VII.7.

¹²⁷ See, e.g., Mingqing Xiao, Are “National Immunity” Rights Applicable to Bacteria War Lawsuits?, 1 *J. Hunan U. Arts & Sci.* 23 (2005) 25–26 (in Chinese).

¹²⁸ “Victims of ‘Chongqing Grand Bombing’ Bring Lawsuit Against Japan,” available at <http://news.163.com/12/0911/08/8B402M9U00014AED.html> (last visited May 16, 2019).

¹²⁹ “Following up Lawsuits Brought by Chinese Laborers Against Japanese Government and Enterprises,” *Nikkei* (March 27, 2014), available at <http://cn.nikkei.com/politics/economy/politicsasociety/8622-20140327.html>.

¹³⁰ Complaint from Tang Guangqin & Tang Guangrong to the Japanese government (2012) (on file with author) (China); Complaint from Huang Daihui to the Japanese government; Complaint from Zhang Shan et. al. to the Japanese government (2012) (on file with author); Complaint from Dong Zhi et. al. to the Japanese government & Mitsubishi Materials Co. (Mar. 24, 2014) (on file with author); Complaint from Yan Zizhen et. al. to the Japanese government & Japanese Coke Industry Joint-Stock Co. (Mar. 24, 2014) (on file with author); Expert Legal Opinion Letter on Compensation

immunity because its actions violated *jus cogens* norms. Neither court has ruled on the exercise of jurisdiction yet—both cases remain pending.

In March 2014, however, the Beijing First Intermediate People's Court accepted a case filed by thirty-seven Chinese forced laborers and their descendants against two Japanese companies alleging their involvement, and consequent liability, in Japan's forced labor programs during World War II.¹³¹ This case marks the first time that Chinese courts have exercised jurisdiction over disputes regarding Japan's treatment of the Chinese during the war.¹³²

At first glance, this case appears to be similar to other private transnational disputes. However, it concerns the application of 1972 Joint Communiqué of the Government of Japan and the Government of the People's Republic of China,¹³³ which contains a provision regarding war reparations for Japan's actions during the war—a key issue in nearly all claims brought by Chinese victims against Japan and Japanese nationals. According to Paragraph 5 of the Joint Communiqué, “[t]he Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan.”¹³⁴

In the mid-1990s, some Chinese war survivors and their descendants began to file lawsuits in Japan. The Chinese plaintiffs claimed that Japan and certain Japanese companies should be held liable for the crimes they committed in World War II, such as forced labor and sexual slavery (the use of so-called “comfort women”). The Japanese government and its courts rejected all of these claims based primarily on the argument that China had relinquished its right and the right of its nationals to claim compensation for war crimes in the 1972 Joint Communiqué.¹³⁵ Of all the cases, the *Nishimatsu Construction* and *Second Chinese “Comfort Women”* cases were the most decisive.¹³⁶ In two judgments

Requested by Chinese Victims to Japan regarding the Chongqing Grand Bombing (July 21, 2012) (on file with author).

¹³¹ “Court Accepts Chinese WWII Forced Labors Lawsuit,” *China Radio International* (March 19, 2014), available at <http://english.cri.cn/6909/2014/03/19/3521s818167.htm>.

¹³² *Id.*

¹³³ Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, China-Japan (September 29, 1972).

¹³⁴ *Id.* para. 5.

¹³⁵ Jianqian Guang, *Equity, Justice and Dignity—Legal Foundation of Claims against Japan by Chinese War Victims* (Shanghai: Shanghai People's Press, 2006) 174–175 (in Chinese); Xingjun Zhang, War Reparation Lawsuits and Judgments in Japan and the Reactions of the Chinese Government—Some Reflections on the Principle of Non-Intervention, 4 *Tsinghua L.J.* 96 (2007) (in Chinese); Aifeng Xing and Tianzhi Li, War Reparation and Civil Compensation—On the Lawsuits for Civil Compensation by Chinese Victims of the Chemical Weapons Abandoned by the Japanese Army, 9 *Int'l L.* 57 (2007) 57 (in Chinese).

¹³⁶ For a review of both cases, see Masahiko Asada & Trevor Ryan, Post-war Reparations Between Japan and China and the Waiver of Individual Claims: Japan's Supreme Court Judgments in the *Nishimatsu Construction Case* and the *Second Chinese “Comfort Women” Case*, 19 *Italian Y.B. Int'l L.* 205 (2009).

rendered together on April 27, 2007, the Supreme Court of Japan (SCJ), held that “[i]t should be out of doubt that all claims arising from the war, including the claims by private individuals, are abandoned mutually.”¹³⁷ The SCJ had not previously reached such a definite conclusion, and this decision effectively closed the window for Chinese victims to seek justice in Japan. Immediately, the spokesman for China’s Ministry of Foreign Affairs (MFA) condemned the SCJ’s interpretation as “void” and “invalid” and stated that the MFA had demanded that the Japanese government “take Chinese concerns seriously and properly resolve this issue.”¹³⁸

China and Japan disagree about the meaning of Paragraph 5 of the Joint Communiqué. Chinese leaders contend that the Communiqué only waives the right of the Chinese government to bring war reparations claims, which means that Chinese nationals are free to bring such claims.¹³⁹ However, China has not supported this interpretation with any significant legal actions. China limited its response to the SCJ’s judgments in 2007 to oral protest; it took no further action (e.g., explicitly allowing Chinese victims to bring claims in Chinese courts).

As the state power of China rapidly expands, relations between China and Japan tend to deteriorate. For instance, in September 2012, Japan claimed that it had purchased the Diaoyu Islands from a Japanese family that, under Japanese law, owned the land.¹⁴⁰ The Diaoyu Islands, known as the Senkaku Islands in Japan, are the subject of an ongoing territorial dispute between China and Japan. China responded to Japan’s action with several measures, including the issuance of a white paper on the Diaoyu Islands¹⁴¹ and the establishment of the East China Sea Air Defense Identification Zone.¹⁴² China, a new great power, and Japan, an old great power, have fallen into strategic confrontations.

The importance of the pending case at the Beijing First Intermediate People’s Court is obvious. First, the two Japanese defendants are likely to invoke the

¹³⁷ Saikō Saibansho [Sup. Ct.] Apr. 24, 2007, 224 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 325, available at http://www.courts.go.jp/app/files/hanrei_jp/591/034591_hanrei.pdf (Japan).

¹³⁸ “China Opposes Japan’s Supreme Court’s Arbitrary Interpretation of the Relevant Provisions of China-Japan Communiqué,” *Xinhuanet* (April 28, 2007, 10:49 AM) (China), available at http://news.xinhuanet.com/mrdx/2007-04/28/content_6039307.htm.

¹³⁹ See “Experts Advise Chinese WWII Laborers to File Class Action,” *People’s Daily Online* (January 15, 2002), available at http://en.people.cn/200201/15/eng20020115_88683.shtml; Xing Aifeng & Li Tianzhi, at 60.

¹⁴⁰ Wu Gufeng, “The Government of Japan Will ‘Purchase’ the Diaoyu Islands for 2.05 Billion Yen” (September 5, 2012, 11:03 AM), available at <http://news.qq.com/a/20120905/001233.htm>.

¹⁴¹ State Council Information Office, “Diaoyu Dao, an Inherent Territory of China,” *China Daily* (September 25, 2012), available at http://www.chinadaily.com.cn/china/2012-09/25/content_15782158.htm.

¹⁴² “Defense Ministry Spokesman on China’s Air Defense Identification Zone,” *Xinhuanet* (December 3, 2013), available at http://news.xinhuanet.com/english/china/2013-12/03/c_132938762.htm.

SCJ's 2007 decisions to defend themselves. The Beijing First Intermediate People's Court thus has an opportunity to clarify the meaning of Paragraph 5 of the 1972 Joint Communiqué. It is expected that it must confirm the established position of China's government and refute the SCJ's position. Second, in contrast with the lawsuits in Tangshan and Chongqing, the plaintiffs in the Beijing case did not list Japan as a defendant. Listing only Japanese companies as the defendants significantly reduces the risk that the case will lead to further diplomatic confrontations between China and Japan. The Beijing First Intermediate People's Court cannot hear the case without the SPC's consent and the MFA's support according to the above-mentioned instrument jointly issued by the MFA, the Chinese Ministry of Public Security (MPS), the Ministry of State Security, the Ministry of Justice, the SPC, and the Supreme People's Procuratorate. The Beijing case thus demonstrates that the Chinese judiciary is subtly becoming involved in foreign relations through the application of international law.

While domestic courts like those in the U.S. have at times gone very far in their exercise of jurisdiction over matters involving other states,¹⁴³ Chinese courts remain at the other extreme. They have no say in foreign affairs. In this context, it is hardly surprising that the Chinese courts have been reluctant to exercise jurisdiction in lawsuits brought by Chinese individuals for the actions of Japan in World War II. In some other countries, for instance, the U.S., domestic courts which were once aggressive in traditional foreign relations, appear to have shifted from judicial activism to judicial passivism.¹⁴⁴

With regard to the long-standing reluctance of Chinese courts to apply international law in relation to state immunity cases, this reflects more than just China's judicial policy toward international law. Rather, many developing states and former socialist states share this reluctance and, in general, support absolute sovereignty. China has become more powerful during its rise and, as a result, it has begun to take seriously the protection of Chinese private interests against foreign states. China's decision to sign the State Immunity Convention indicates that it has begun to refine its traditional conception of sovereignty. In time, Chinese courts will begin to hear disputes between Chinese nationals and foreign states.

¹⁴³ See generally Anne-Marie Slaughter and David Bosco, Plaintiff's Diplomacy, 79 *Foreign Aff.* 102 (2000); John Norton Moore, *Foreign Affairs Litigation in United States Courts* (Leiden: Martinus Nijhoff Publishers, 2013); Curtis A. Bradley, Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries, *ASIL Insight* (April 18, 2013).

¹⁴⁴ See, e.g., Chimène I. Keitner, The Reargument Order in *Kiobel v. Royal Dutch Petroleum* and Its Potential Implications for Transnational Human Rights Cases, *ASIL Insight* (March 21, 2012).

5.2 Rules Granting Rights to Individuals vis-à-vis the State

A second category of cases where Chinese courts engage international law are those where treaties grant rights to individuals vis-à-vis states. A search using Pkulaw.cn reveals that Chinese courts have occasionally applied international law in such cases, for instance, in *Longines Co. v. Trademark Review & Adjudication Board*, as mentioned previously. However, the search did not reveal any cases in which Chinese courts gave direct effect to human rights treaties, which constitute the core of this kind of legal relationship and which are crucial to enhancing the rule of law, especially in transitional states.

China has ratified many human rights treaties, including most of the core conventions, such as the CAT and the ICESCR. China itself has expressed its intention to grant direct effect to the CAT. In 1990, China's representative to the Committee against Torture stated:

[O]ffences under the Convention were also regarded as offences under Chinese domestic law. When China acceded to any convention, it became binding as soon as it entered into force. China then fulfilled all its obligations, and it was not necessary to draft special laws to ensure conformity. If an international instrument was inconsistent with domestic law, the latter was brought into line with the former. Where subtle difference remained, international instruments took precedence over domestic law.¹⁴⁵

This statement was widely regarded as important evidence that such treaties would be automatically incorporated in China.¹⁴⁶ In 2000, China's representative to the Committee against Torture stated more explicitly that the Torture Convention "could be invoked before the Chinese courts."¹⁴⁷ Unfortunately, China's criminal law does not include torture as a crime, despite reports of widespread use of torture.¹⁴⁸ In addition, Chinese courts have thus far ignored the Chinese representatives' statements that they can directly apply the CAT. Interestingly, however, the MPS has ordered, at least rhetorically, that

¹⁴⁵ Committee Against Torture, Summary Record of the 51st Meeting, U.N. Doc. CAT/C/SR.51 (May 4, 1990), para. 2.

¹⁴⁶ See, e.g., Li Zhaojie, at 341; Sanzhuan Guo, at 165.

¹⁴⁷ Committee Against Torture, Summary Record of the 419th Meeting, para. 9, U.N. Doc. CAT/C/SR.419 (May 12, 2000).

¹⁴⁸ See Committee Against Torture, Concluding Observations of the Committee Against Torture: China, para. 11, U.N. Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008); Wang Guanxian, at 273–274; Dai Ruijun, at 273.

its local branches must “strictly abide” by the provisions of the CAT.¹⁴⁹ This demonstrates that the executive branch recognizes that executive power should be contained. However, it is also clear that the executive prefers to rely on its own internal executive mechanisms rather than external judicial mechanisms. The major reason seems clear: more discretion would be protected under the former mechanism than the latter one.

In recent years, it seems that China has sought to distance itself from its earlier statements regarding the Torture Convention. It has sought to clarify that its courts would not directly apply human rights conventions. For instance, in its second periodic report to the Committee on Economic, Social and Cultural Rights, China claimed that human rights treaties “do not directly function as the legal basis for the trial of cases in Chinese courts, and human rights treaties are no exception; rather, they are applied after being transformed into domestic law through legislative procedures.”¹⁵⁰ In response, the Committee recommended that China should “guarantee the direct applicability of all rights” under the ICESCR.¹⁵¹ China’s argument in its periodic report for why it would not directly apply human rights conventions is not totally convincing for two reasons. First, as indicated earlier, China previously recognized the direct effect of the CAT at the international level, and this remains unchanged. Second, as discussed earlier, the NPC repealed Article 72 of the APL of 1990 as a legal basis for automatic incorporation in the 2014 amendments to the APL. From the perspective of Chinese courts, Article 72 of the APL of 1990 was the justification for incorporating China’s CAT obligations into its legal system.

China’s application of international legal commitments granting rights to individuals vis-à-vis the state is characterized by a critical dichotomy. On the one hand, China is a state party to many instruments, including human rights treaties, which help contain executive authority. It is well known that, since the late 1980s (especially since the Tiananmen Square incident in 1989), China and the West have fiercely sparred over human rights affairs, and China has been accused of systematic violations of human rights.¹⁵² China’s increasing acceptance of human rights treaties has helped it to better integrate itself into the international community. An acceptance of human rights is indispensable for a state in the process of rising as a great power in the era of human rights. On the

¹⁴⁹ Ministry of Public Security, Notice Concerning Strictly Complying with Public Security-related Provisions of International Treaties (March 24, 1989).

¹⁵⁰ Committee on Economic, Social and Cultural Rights, Second Periodic Report Submitted by States Parties Under Articles 16 and 17 of the Covenant: China, U.N. Doc. E/C.12/CHN/2, July 6, 2012, at 9.

¹⁵¹ Committee on Economic, Social and Cultural Rights, Concluding Observations on the Second Periodic Report of China, para. 9, U.N. Doc. E/C.12/CHN/CO/2 (June 13, 2014).

¹⁵² See generally Rosemary Foot, *Rights Beyond Borders: The Global Community and the Struggle over Human Rights in China* (Oxford: Oxford University Press, 2000).

other hand, China seeks to insulate its executive authority from international pressure by neutralizing the application of human rights treaties in the judiciary. In practice, China disallows the automatic incorporation of treaties under which executive authority might be seriously challenged. As a result, China's executive branch can take advantage of the supposed socialist "efficiency" advantage. The 2014 amendment of the APL demonstrates that China remains reluctant to encourage the application of international law in its domestic courts.

5.3 Rules-based Extensions to States' Authority

A third category of rules concerns situations where international law extends states' authority over a new class of subjects, for example, through rules of universal jurisdiction in the case of piracy. Private actors, such as pirates and terrorists, currently pose serious challenges and threaten peace and security, which makes this category one of growing importance for the domestic courts that will increasingly need to address such threats.¹⁵³

Until the 1980s, China had no law relating to the exercise of jurisdiction for cases where international law, rather than national law, permitted such jurisdiction. In 1987, China enacted a law requiring courts to exercise criminal jurisdiction over crimes proscribed by treaties to which it has acceded.¹⁵⁴ The NPC later incorporated this law in the 1997 amendments to China's criminal law.¹⁵⁵

On some past occasions Chinese authorities should have exercised jurisdiction but failed to do so. This may result from a lack of knowledge of Chinese judges of international law. For example, in 1998, Indonesian pirates in the South China Sea hijacked the *M.V. Petro Ranger*, a Malaysian flagged cargo ship.¹⁵⁶ The pirates renamed it the *M.V. Wilby* and reflagged it as a Honduran ship.¹⁵⁷ Later, when the ship arrived in China, the local authorities detained

¹⁵³ M. D. Saiful Karim, *Prosecution of Maritime Pirates: The National Court Is Dead—Long Live the National Court?*, 32 *Wis. Int'l L.J.* 37 (2014).

¹⁵⁴ The NPCSC, *Decision Regarding Exercising Criminal Jurisdiction over the Crimes Proscribed in the International Treaties to Which the People's Republic of China is a Party or Has Acceded* (promulgated by the Standing Comm. Nat'l People's Cong., June 23, 1987). China is a party or has acceded to such conventions as, among others, the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on Psychotropic Substances, and the Single Convention on Narcotic Drugs. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175; Single Convention on Narcotic Drugs, Dec. 13, 1964, 520 U.N.T.S. 151.

¹⁵⁵ Criminal Law (promulgated by the Nat'l People's Cong., July 1, 1979, as amended in 1997).

¹⁵⁶ See Weihua Tong, *Terrorist Crimes at Sea and Criminal Regulation on the Crime of Piracy* (Beijing: Law Press, 2013) 8–9 (in Chinese).

¹⁵⁷ *Id.*

the ship and arrested all noncrew personnel on board for smuggling.¹⁵⁸ However, Chinese authorities decided not to prosecute the arrestees because they found there was a lack of convincing evidence, a decision criticized by the International Maritime Bureau.¹⁵⁹

On other occasions, however, Chinese courts have exercised jurisdiction. For instance, in June 1999, ten pirates hijacked the *Siamxanxai*, a Thai flagged oil tanker, in Malaysian territorial waters.¹⁶⁰ Later, the tanker entered Chinese territorial waters, and the local authorities arrested the hijackers.¹⁶¹ The Shantou City Intermediate People's Court held that these pirates violated treaties to which China is a party, including the UN Convention on the Law of the Sea and the Navigation Safety Convention of 1988.¹⁶² Since China's criminal law does not proscribe piracy, the court held that the defendants committed robbery instead.¹⁶³

While Chinese courts have historically been reluctant to exercise their jurisdiction when international law permits, or even requires it, they are becoming more willing to do so. China's increasing engagement in economic globalization has created more threats to its economic and security interests, such as piracy, transnational organized crime, and international terrorism. To respond to these threats, China has opened a window for its courts to exercise jurisdiction. For example, Huang Huikang, then the director general of the Department of Treaty and Law of the MFA, has argued that there is no legal hindrance preventing Chinese courts from exercising universal jurisdiction over Somali pirates.¹⁶⁴

5.4 Rules Governing Relations between Private Individuals

For Chinese courts, a fourth relationship often governed by international law is that between private parties, predominantly in the business context. Disputes between private parties have little to do with public authority, and the subject area is widely treated as transnational private law rather than public international law. Thus, international lawyers focused on public law concerns rarely

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Atan Naim et al., Robbery [2003] (Shantou Municipal Interm. People's Ct. Jan. 15, 2003).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Huikang Huang, Fighting Somali Pirates by Naval Escort: Legal Basis and Judicial Procedure, 2011 *Ann. China Maritime L.* 1 (2011) 5 (in Chinese).

publish works on the UN Convention on Contracts for the International Sale of Goods (CISG), even though it is a treaty.

Chinese courts apply international law regulating relations between individuals more frequently than any other category of international law. In this category, scholars have conducted case studies on the application of the CISG, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the Paris Convention for the Protection of Industrial Property (Paris Convention), the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), and the International Convention on Civil Liability for Oil Pollution Damage (CLC).¹⁶⁵ For the purposes of this book, it is not necessary to introduce more individual cases here. Rather, it suffices to simply provide several figures. A search on Pkulaw.cn reveals that the CISG has been applied in 198 cases, the New York Convention has been applied in 66 cases, the Paris Convention has been applied in 381 cases, the Berne Convention has been applied in 622 cases, and the CLC has been applied in 16 cases as of January 18, 2016. Although there are some drawbacks to the application of these treaties,¹⁶⁶ the SPC firmly supports the position that they should be applied in good faith. It has established reporting and reviewing mechanisms to guide and supervise the application of treaties by local courts.¹⁶⁷ According to one empirical study, these mechanisms effectively remedy the legal errors that occur in local courts when they apply international law.¹⁶⁸

How does one explain the prominence of this set of international legal rules in Chinese domestic law? One of China's primary strategies arising from the economic collapse that followed the Cultural Revolution (1966–1976) was to attract capital and technology from Western states. China's command economy discouraged international investors and traders who operated in market economies, and it could not create a legal regime to support a fully fledged market economy in a short period of time. Therefore, it became expedient for China to incorporate international regimes (e.g., the CISG and the Paris Convention) into its domestic legal system, which increased foreign confidence

¹⁶⁵ See Zheng Sophia Tang, International Treaties in Chinese Private International Law, 42 *Hong Kong L.J.* 311 (2012); Jie Huang, Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation, 5 *Manchester J. Int'l Econ. L.* 105 (2008); Xiao Yongping and Long Weidi, Selected Topics on the Application of the CISG in China, 20 *Pace Int'l L. Rev.* 61 (2008).

¹⁶⁶ Yongping and Weidi, at 101–102.

¹⁶⁷ See SPC, Notice Concerning Issues Regarding Foreign-related Arbitration and Foreign Arbitration by People's Courts (Promulgated by the Sup. People's Ct., Aug. 28, 1995, effective Aug. 28, 1995).

¹⁶⁸ Honglei Yang, Report on the Judicial Review of International Arbitration in Chinese Courts, 9 *Wuhan U. Int'l L. Rev.* 304 (2009) 311 (in Chinese).

in investment and trade without seriously challenging executive authority. This increased investment and trade confidence allowed massive amounts of foreign capital and technology to flow into China, which accelerated the country's prodigious economic growth.

6. Other Judicial Measures Relevant to International Law

In addition to treaty applications, Chinese courts have recently taken several measures which are relevant to international law. These measures demonstrate that Chinese courts have a clearer and more ambitious aspiration to enhance the rise of China.

First, Chinese judges are now actively involved in treaty negotiations. The SPC required that courts "actively participate in international rule-making, attach high importance in help the relevant authorities negotiate treaties, and thereby increase voice of Chinese judiciary in the formation of international rules in relation to investment, trade and shipping."¹⁶⁹ It is for this reason that, at the request of executive authorities (for instance, the MOC), some Chinese judges were invited to participate in the negotiations of investment treaties between China, the U.S., and the EU, the Draft International Convention on Foreign Judicial Sales of Ships and their Recognition, and so on.¹⁷⁰ Presumably this might raise a concern about possible conflicts of interest to have courts, as adjudicators of the law, directly participate in lawmaking. This obviously is justified under the Chinese constitutional framework, however. Furthermore, this type of participation may have functional legitimacy because, as more treaties are applied in national courts than before, the involvement of domestic judges in treaty negotiations in some manner may help diplomats prepare better treaties by, for instance, defining legal terms more clearly.

Second, Chinese courts sometimes endeavor to further Chinese international legal claims even when deciding disputes in which no international law is invoked. An eye-attracting example is the *Mingxiayu 01971* case. On September 24, 2014, *Mingxiayu 01971*, a Chinese fishing vessel, collided with *Yushoharuna*, a cargo ship with Panama's flag, in the waters adjacent to Diaoyu Island over which both China and Japan claim sovereignty and tensions have intensified since the "purchase" of Diaoyu Island by Japan in 2012. The Xiamen Maritime Court heard that case and helped the parties finally settle. Chief Justice Zhou Qiang, in his working report to the NPC, declared that it

¹⁶⁹ SPC, Opinions of Judicial Guarantee (2015).

¹⁷⁰ He Rong, at 13.

highlighted “China’s right of jurisdiction over waters around Diaoyu Islands.”¹⁷¹ Japan’s government raised a diplomatic protest against the exercise of jurisdiction over the *Mingxiayu 01971* case.¹⁷²

Third, Chinese courts are working to expand transnational judicial dialogues and cooperation. For instance, in the third conference on foreign affairs of courts held in 2017, Chief Justice Zhou Qiang stressed that Chinese courts would comprehensively promote international judicial exchanges by which China would contribute “Chinese judicial wisdom” for global governance.¹⁷³ For this purpose, China will expand its capability for training foreign judges from BRI countries and for increasing assistance to national courts in BRI countries.¹⁷⁴ Furthermore, Chinese courts are encouraged to take advantage of various international forums to learn the trends in international judicial administration and to introduce the world to Chinese judicial policy and achievements.¹⁷⁵ The SPC also seeks to increase its working relationship with the ICJ.¹⁷⁶ Although it is too early to say that Chinese courts will, through transnational dialogues and cooperation, exert substantial influence on international law, such activities are very helpful for Chinese courts to explain and argue for Chinese international legal policies and practice.

7. Concluding Remarks

How Chinese courts deal with international law depends on several factors which include strategic factors, constitutional factors, and professional factors. For instance, the socialist identity obviously is a major factor, making China choose to deal with the status of international law in its legal system on a case-by-case basis. On the one hand, this leads to fragmentation and reduces the predictability of the application of international law. On the other hand, it allows for significant flexibility when deciding whether to apply international law. The constitutional silence makes it easier for China to decide which methodology—automatic incorporation or transformation—to use in the

¹⁷¹ Zhou Qiang, Working Report of the SPC (2016).

¹⁷² “Japan Protests that China Argues That It Has Judicial Jurisdiction over Waters Around Diaoyu Islands” available at <https://finance.sina.com.cn/sf/news/2016-03-16/102724036.html> (last visited May 16, 2019).

¹⁷³ “Serve the Strategy of the CCP and the State and Promote New Landscape of Foreign Affairs of People’s Courts,” available at <https://www.chinacourt.org/article/detail/2017/06/id/2889579.shtml> (last visited May 16, 2019).

¹⁷⁴ *Id.*

¹⁷⁵ Opinions of Judicial Guarantee (2015).

¹⁷⁶ “SPC head meets with ICJ president,” available at http://english.court.gov.cn/2016-09/06/content_26716019.htm (last visited May 16, 2019).

application of a particular treaty. As China has become a “revisionist” socialist state, whether, when, and how China will define the role of international law in its legal order, which further affects Chinese judicial policy toward international law, remains to be seen.

A more intriguing issue that I would have addressed in this chapter is how China frames its judicial policy toward international law to achieve long-term public policies. Over the past forty years, the fundamental public policy of China has consistently been to rise as a great power, especially an economic power. And the basic approach to achieving this policy goal is the Beijing Consensus, which has two core elements: an emphasis on economic growth over political freedom and social justice, and the maintenance of an authoritarian regime with unfettered executive authority. Chinese courts thus have developed the judicial policy of strategically treating international law. While this judicial policy is arguably effective to enhance the rise of China, it limits the role of Chinese courts in enhancing the rule of law, either international rule of law or national rule of law.

Therefore, China initially stressed the application of international laws governing commercial relationships between private parties, but attached little importance to international law that grants rights to individuals vis-à-vis the state and establishes its jurisdiction against individuals, and completely disallowed the application of rules infringing on the principle of absolute state sovereignty. Now, as China rises, it has begun to adjust its traditional judicial policy in order to protect its expanding overseas interests and exhibit its image of rising power. Under China’s new judicial policy, Chinese courts have increasingly exercised jurisdiction in accordance with international law. In addition, Chinese courts have increased the engagement with international law in some unique manners, for instance, the involvement in treaty negotiations. Since China maintains the established position that a strong executive authority is necessary for its rise, however, the new judicial policy still provides little room for the application of rules granting rights to individuals vis-à-vis the state in general and to human rights treaties in particular. The removal of international law provisions in several Chinese laws, for instance, the APL (2104), affirms the trend that Chinese courts are not allowed to contain executive authority by applying international law will continue—in a word, the judicial policy of strategically treating international law.

Lawfare in Dispute Settlement

1. Introduction

How China handles international disputes is a major concern for many countries and observers. For a long period, however, people have known little about how China actually uses international law to resolve international disputes and whether international law really makes a difference in the settlement of international disputes in which China is involved.¹ A major reason for this dearth of knowledge is that China traditionally rejected the international adjudication that would have allowed people, by observing proceedings and reading judgments rendered by international judges, to find out how China invokes international law. Instead, China resolved international disputes through negotiation and consultation, which are essentially closed to observers. This litigation-averse approach has been often explained by reference to China's unique ideology and culture, the marginal presence in international law-making, and the high sensitivity of many China-involved disputes (e.g., territorial disputes).

It is arguable that China's admission to the WTO, which includes a dispute settlement body with compulsory jurisdiction, signals the dawn of China's new approach to international adjudication. Indeed, China has been confident in employing the WTO dispute settlement mechanism both as a complainant and as a defendant.² For many people, however, the China-Philippines SCS

¹ For instance, international lawyers have long explored whether the ISDS provisions in Chinese investment treaties would really work. It was not until this century, however, that China's government and investors have been involved in the ISDS mechanism. See, e.g., Lars Markert, Arbitration under China's Investment Treaties—Does It Really Work?, 5 *Contemp. Asia Arb. J.* 205 (2012); Monika C. E. Heymann, International Law and the Settlement of Investment Disputes Relating to China, 11 *JIEL* 507 (2008); Stephan W. Schill, Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China, 15 *Cardozo J. Int'l & Comp. L.* 73 (2007); Kong Qingjiang, Is There a Way in the Labyrinth of Treaty Norms Leading to the Applicable Rule: Investor-State Investment Settlement under the China-Korea FTA, China-Japan-Korea BIT and China-Korea BIT, 29 *Colum. J. Asian L.* 178 (2016); Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford: Oxford University Press, 2009).

² See, e.g., Yang Guohua, China in the WTO Dispute Settlement: A Memoir, 49 (1) *J. World Trade* 1 (2015); Xiuli Han, China's First Ten Years in WTO Dispute Settlement, 13 *J. World Investment & Trade* 49 (2011); Manjiao Chi, Trade-Plus Effects of WTO Dispute Settlement on China: An Idea or Illusion? 47 (6) *J. World Trade* 1349 (2013); Wenhua Ji and Cui Huang, China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective, 45 (1) *J. World Trade* 1 (2011); Tong Qi, China's First Decade Experience in the WTO Dispute Settlement System: Practice and

arbitration cast a grave shadow on the question of whether or not China really takes international law seriously in international disputes. In that case, China firmly asserted its position that it neither “accepts” or “participates in” the SCS proceeding nor “enforces” the award that was rendered by the SCS Tribunal in favor of the Philippines and. Many commentators, in examining China’s changing policies and practice in international adjudication, acknowledge that it is difficult to draw any definite conclusions on China’s future policy of international adjudication for the time being.³ For instance, Ku suggested that there was little evidence to support the notion that China would willingly subject itself to compulsory jurisdiction if avoiding doing so was available; however, given China as a global power, Ku also argued that the “safe” prediction may be that “for better or for worse, the PRC would play a key role in shaping the future of international adjudication.”⁴

That being said, international adjudication is still a proper venue to explore how China engages international law. First, over the course of time, China has been involved in and is expected to continue to involve itself in international adjudication whether it prefers to do so or not. A major reason, as Ku accurately observes, is that the rise of international adjudication has coincided with the rise of China as a leading power.⁵ Second, compared with less powerful countries, great powers have more tools in their toolbox with which to tackle international disputes, and thus they may not be friendly to international adjudication.⁶ The question then arises as to whether or not China’s approach to international adjudication is similar with that of the U.S. approach, as Ku suggests.⁷

Prospect, 7 *Asian J. WTO & Int’l Health L. & Pol’y* 143 (2012); Julia Ya Qin, Pushing the Limit of Global Governance: Trading Rights, Censorship and WTO Jurisprudence—A Commentary on Case, 10 *Chinese J. Int’l L.* 271 (2011); Yenkong Ngangjoh Hodu and Zhang Qi, *The Political Economy of WTO Implementation and China’s Approach to Litigation in the WTO* (Mass.: Edward Elgar, 2016) Chapter 7.

³ See, e.g., Julian Ku, China and the Future of International Adjudication, 17 *Md. J. Int’l L.* 154 (2012); Dan Zhu, Chapter 2.

⁴ *Id.*, at 171, 173.

⁵ *Id.*, at 155.

⁶ For instance, after the ICJ, at the request of Iran, indicated provisional measures requiring the U.S. to lift some sanctions against Iran on October 3, 2018, the U.S. immediately declared that it is terminating the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the two countries. See Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018; Carol Morello, “U.S. terminates 1955 treaty with Iran, calling it an ‘absolute absurdity,’” available at https://www.washingtonpost.com/world/national-security/us-terminates-1955-treaty-with-iran-calling-it-an-absolute-absurdity/2018/10/03/839b39a6-3bcf-42b1-a2d5-04bfe1c5f660_story.html?utm_term=.58bd56272f1a (last visited May 17, 2019).

⁷ Julian Ku, at 155, 157.

China's growing involvement in the WTO dispute settlement mechanism has spurred a substantial body of publications. Nearly all authors conduct narrow legalist analysis on how China has invoked the WTO rules and what WTO rules it invoked to question the trade measures taken by other WTO Members or to defend the questioned trade measures that China has taken.⁸ Unfortunately, these publications largely ignore the fact that international disputes are influenced not only by legal factors but also by political, economic, and cultural factors.⁹ In this chapter, I do not seek to merely present a general description of how China's policies on international dispute settlement have changed over the past several decades. Also, I do not try to conduct a narrow legalist investigation of the specific legal rules China invokes to resolve international disputes, because as many other international lawyers have done this and while it is important, it is obviously impossible in limited pages. Through inventing a normative analytical framework for lawfare in international crises, I rather seek to theorize how China formulates a legal strategy by examining lawfare in the settlement of international disputes. I believe that this attempt not only better evaluates the capability of China to use international law in the context of the judicialization of international law but also provides a unique perspective on how China understands international law in the context of being the rising power.

This chapter consists of three sections in addition to introduction and concluding remarks. "Lawfare" has become a fashionable term in the past decade. However the broad use of this term has caused the damage to its explanatory value, and international lawyers have not yet developed a normative framework to analyze this term but rather have merely described lawfare activities in the settlement of international disputes. In light of this, Section 2 first reviews the concept of lawfare and then invents a normative framework for analyzing lawfare. As it rises as a new great power, China will inevitably become more involved in international adjudication. Section 3 thus examines China's changing policies and practice in international adjudication in the context of

⁸ One of few exceptions is "China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective." See Wenhua Ji and Cui Huang, *id.* Wenhua Ji is a legal official at the MOC of China who is responsible for WTO-related disputes. Wenhua Ji and Cui Huang, in reviewing China's first ten years of experience in dealing with WTO disputes, explained which method would be chosen, which respondent was targeted, and when the proceeding would be launched. They found that academic studies "rarely put a specific dispute into the context of broader trade and economic relations or relate legal analysis to the social, economic, trade, industrial, and political consequence of how a dispute is ultimately resolved. By contrast, a government managing a trade tussle will and had to do all these things because the latter is as important as the former" *Id.*, at 33.

⁹ See generally Laurence Boisson de Chazournes, Marcelo G. Kohen and Jorge E. Viñales ed., *Diplomatic and Judicial Means of Dispute Settlement* (Leiden: Martinus Nijhoff Publishers, 2013); J. G. Merrills, *International Disputes Settlement* (Cambridge: Cambridge University Press, 5th ed., 2011) 286–295.

the rise of China and the judicialization of international law. Section 4 applies the normative framework developed in Section 2 and analyzes how China understands and uses international law to handle the China-Philippines SCS arbitration and the China-U.S. trade war, which are surely two crises that China and the entire international community face.

2. A Normative Analytical Framework for Lawfare in International Dispute Settlement

2.1 Lawfare in International Dispute Settlement

2.1.1 Why Does Lawfare Matter Nowadays?

John Carlson and Neville Yeomans first created the term “lawfare” in 1975; as the two authors contended, “lawfare replaces warfare and the duel is with words rather than swords.”¹⁰ It was not until November 2001, however, that Dunlap, a U.S. Air Force attorney made this term popular in international legal debates. Shortly after the 9/11 terrorist attack and the “antiterrorist war” accordingly waged by the U.S. against Afghanistan, Dunlap referred to “lawfare” as “the use of law as a weapon of war” in his paper and regarded it as “the newest feature of 21st century combat.”¹¹ Charles J. Dunlap observed an emerging concern in the U.S. that international law, especially law of armed conflict (LOAC), appeared to undermine the ability of the U.S. to conduct effective military intervention and to further weaken American leadership in the global system.¹² Dunlap did not deny the importance of the LOAC, but he warned that “lawfare practitioners cannot be permitted to commandeer it for malevolent purposes.”¹³ In 2008, Dunlap developed his understanding of lawfare, defining it as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”¹⁴ Dunlap acknowledged that lawfare could be used “for good or bad purposes.”¹⁵ With respect to its good purposes, it can “reduce the destructiveness of war, if not its frequency” by putting military operations into the orbit of rule of law.¹⁶ On the other hand, as “an asymmetrical

¹⁰ John Carlson and Neville Yeomans, *Whither Goeth the Law—Humanity or Barbarity*, in M. Smith & D. Crossley eds. *The Way Out—Radical Alternatives in Australia* (Melbourne: Lansdowne Press, 1975), available at <http://www.lacweb.org.au/whi.htm> (last visited May 25, 2019).

¹¹ Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* (November 29, 2001), available at <https://people.duke.edu/~pfeaver/dunlap.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 *Yale J. Int'l Aff.* 146 (2008) 146.

¹⁵ *Id.*

¹⁶ *Id.*, at 147.

form of warfare,”¹⁷ it has been often employed by American adversaries.¹⁸ As a result, counter-lawfare is needed as a response to lawfare. Fraki, a lieutenant colonel in the U.S. Air Force Reserve JAG Corps., defined counter-lawfare as “defensive measures to reduce vulnerability to the enemy’s use of lawfare and action to contain and minimize the effectiveness of lawfare,” which included, but was not limited to, “preparing the legal battlespace; denying, disrupting, and degrading the enemy’s ability to use lawfare; and delegitimizing the enemy’s lawfare efforts.”¹⁹

According to Goldsmith, who was appointed by then President G. W. Bush to develop a solution to engage lawfare, many states and nonstate actors “have been busily weaving a web of international law and judicial institutions that today threaten US interests.”²⁰ Goldsmith warned that this situation was “especially urgent” in the wake of “war on terrorism” waged by the U.S. and that, “unless the U.S. tackle the problem head-on, it will continue to grow.”²¹ In 2005, the U.S. Defense Department identified lawfare something similar to terrorism.²² Goldsmith found, sadly, however, that the U.S. National Security Council “couldn’t figure out what to do about” lawfare.²³ In *Lawfare: Law as a Weapon of War*, published in 2016, which is perhaps the sole book exclusively discussing lawfare, Kittrie found that lawfare has been waged “more aggressively and systematically” than before, and thus American’s decision not to accept the ICC seemed “justified.”²⁴ Kittrie lamented that the U.S. still failed to adopt “a broad and systematic lawfare strategy, with a robust offensive component.”²⁵

Three major factors are believed to contribute to lawfare’s significance for international relations in the past two decades. First, international law has steadily increased its importance in regulating international relations in terms of their legality and legitimacy, as international law continually expands in scope and content and the conception of rule of law gradually extends from the domestic sphere to the international sphere. Second, states still have broad discretion to interpret international obligations which they have undertaken.

¹⁷ Charles J. Dunlap Jr., *Lawfare Today . . . and Tomorrow*, 87 *Int’l L. Stud. Ser. US Naval War Col.* 315 (2011) 316.

¹⁸ Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st-Century Conflicts?* 54 (3) *JFQ* 34 (2009) 36.

¹⁹ David J. R. Fraki, *Lawfare and Counterlawfare: The Demonization of the Gitmo Bar and Other Legal Strategies in the War on Terror*, 43 *Case W. Res. J. Int’l L.* 335 (2010–2011) 346.

²⁰ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton & Company, 2009) 59.

²¹ *Id.*

²² U.S. Department of Defense, *The National Defense Strategy of the United States of America*, March 2005, at 5.

²³ Jack Goldsmith, at 63.

²⁴ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016) 31.

²⁵ *Id.*

Third, international law has been increasingly applied by third bodies, especially international courts, in addition to states themselves. Therefore, international law has been more often recognized as a meaningful “weapon” with which legal arguments are presented, defended and enforced. Less powerful nations especially find that international law can be relied upon as leverage against powerful nations.

There is a trend for the term “lawfare” to be used too liberally. For instance, it is found that Kittrie, in *Lawfare: Law as a Weapon of War*, considers legal actions in nearly all occasions to constitute lawfare, failing to distinguish lawfare with other legal actions. This liberal use of “lawfare” not only reduces its potentially explanatory value but also prevents international lawyers from developing a normative analytical framework for lawfare. What they have done is to merely describe specific activities that they deem as lawfare. Two commentators thus warned that the term “now has come to mean so much more than what it was originally supposed to,” and warned this would reduce its overall usefulness.²⁶

Arguably, a critical question with the rule of law is whether it can survive and help predict human activities in crises or “in the worst of times.”²⁷ As far as international crises are concerned, on most occasions they not only involve critical legal issues, but they are also caught up with many fundamental nonlegal concerns. It is in international crises that a state may discover that it should mobilize substantial resources and formulate a sophisticated strategy to defend its legal argument and, more generally, national interest. Thus, focusing on how a state handles an international crisis allows us to better find what approach to international law a state has, how it uses, misuses, or abuses international law, and whether international law really matters in international relations.²⁸ Therefore, only in international crises is it appropriate to discuss “lawfare.” Furthermore, this discussion also helps us develop a normative framework for lawfare. Not surprisingly, people may disagree on how to define international crises. They may, however, agree on which events are international crises. For example, it is hard to deny that the SCS arbitration and the China-U.S. trade war are two crises for China and for the whole international community as well.

Lawfare has two functions: legality and legitimacy. On the one hand, a state, by engaging lawfare, may claim that an act it has conducted is legal, while a particular act of another state is illegal. In other words, lawfare may function

²⁶ Michael Scharf and Elizabeth Andersen, Is Lawfare Worth Defining?, Report of the Cleveland Experts Meeting, September 11, 2010, 43 *Case W. Res. J. Int'l L.* 11 (2010–2011) 14.

²⁷ Ronald A. Cass, The Rule of Law in Time of Crisis, 51 *Howard L.J.* 653 (2008) 654.

²⁸ Ten legal advisers of the U.S. Department of State from 1977 to 2009 introduced how the U.S. used international law to handle international crises. See Michael P. Scharf and Paul R. Williams, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010).

to acquire the legality. On the other hand, lawfare may be initiated with the aim to persuade others of the legitimacy of a certain act. In lawfare, a state may pursue both legality and legitimacy, while it may only seek one of the two. It should be stressed that, in light of three major characteristics of international law, which include (1) international law exists in a horizontal, state sovereignty-based world; (2) international law is heavily affected by political system; and (3) international law is quite poor in the formal rationality, the function of legitimacy of lawfare is as significant—if not more significant—than the function of legality.

2.1.2 Toward a Normative Analytical Framework for Lawfare

Radhika Withana developed the “International Law as Ideology” (ILI) concept to explain the relationship between ideas and law in the behavior of states during international crises. The ILI is based upon an assumption that “ideas have power.”²⁹ In this sense, the ILI is a framework for lawfare, even though Withana did not use the term “lawfare.” In my opinion, Withana attached too much importance to “ideology” while failing to pay due regard to the characteristics of international crises. Furthermore, she failed to consider the application of the ILI in the broad context of recent developments in international law, including the judicialization of international law. By contrast, based upon the three major characteristics of international law previously mentioned, I develop a normative analytical framework by illustrating how a state, in handling international crises, conceptualizes and frames the relationships between community versus individual; politics versus law; and good faith versus bad faith.

2.1.2.1 *Community vs. Individual*

International law exists in a horizontal, state sovereignty-based world. This means that international law functions to regulate relations of individual states. As a matter of fact, international law was once believed to be a “higher private law,”³⁰ “but private law writ large.”³¹ Lauterpacht also suggested that international law belonged to “the genus private law.”³² In other words, the traditional pattern of international law is “bilateral.”³³ This pattern means that most disputes concern two individual states, for instance, between State A and State

²⁹ Radhika Withana, *Power, Politics, Law: International Law and State Behaviour During International Crises* (Leiden: Martinus Nijhoff Publishers, 2008) 63.

³⁰ See H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd., 1927) 81.

³¹ Thomas Erskine Holland, *Studies in International Law* (Oxford: Oxford University Press, 1898) 152.

³² H. Lauterpacht, at 81.

³³ Bruno Simma, From Bilateralism to Community Interest in International Law, 250 *Recueil des Cours* 229 (1994) 229–230.

B, and are not related to any third country. More community interest, however, has emerged since the second half of the twentieth century, which enhances a “community interest” pattern of international law.³⁴ This trend implies that some disputes directly happening between two states may have important implications on some other states or the whole international community.

The community versus individual relationship implies two important legal strategies in the lawfare. It may be conceptualized to communalize or multilateralize some individualist or bilateral disputes. It may also be conceptualized to individualize or bilateralize disputes with community interest, rights, or concern. Therefore, when a dispute occurs between State A and State B, State A may claim that State B is liable to State A due to its violations but also claim State B is liable to other states or even to the whole international community. In the most extreme scenario, State B, according to Rawls’s international legal theory, might be disparaged as an “outlaw” member of international community.³⁵ By doing so State A may proclaim that fighting against State B protects not only its own rights but also the international community’s interest. As a result, State A is likely to win support from other states while preventing those states from siding with State B and alienating State B from the international community, thereby placing State B under additional legal and political pressure. As a response, State B will seek to pierce the “veil” of community, preventing State A from seeking supports from other states and denying the justification of other states to intervene in the dispute between State A and State B.

A telling example is the *Hostages* case.³⁶ In that case, dozens of diplomatic personnel of the U.S. embassy in Tehran were taken by an armed group as hostages in February 1979, and subsequently the government of Iran not only tolerated and encouraged that act but also failed to prevent it and punish the wrongdoing.³⁷ As a response, the U.S., on November 9, 1979, filed with the ICJ an Application and Request for interim measures of protection, requiring urgent consideration of what may be done to secure the release of hostages. In the following days, the president of the ICJ, the president of the UN Security Council, and the president of the UN General Assembly successively urged that Iran release hostages; the UNSC adopted Resolution 457(1979) and Resolution

³⁴ *Id.*, at 233–234.

³⁵ See Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004) 296–297.

³⁶ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of American v. Iran), Order of Dec. 15, 1979 [1979] I.C.J. Rep. 7; Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of American v. Iran), Judgment of May 25, 1980, [1980] I.C.J. Rep. 3.

³⁷ *Hostages Case*, Judgment, *id.*, at 11–16.

461 (1979), calling for the release of hostages; the Secretary-General announced the establishment of a commission to conduct a fact-finding on the events. On December 15, the ICJ unanimously indicated several provisional measures including calling for the immediate release of all American diplomatic personal and according them with full protection, privileges, and immunities.³⁸ On May 24, 1980, the ICJ issued the judgment, which, among others, decided that Iran “has violated in several aspects, and is still violating obligations” that it owed to the U.S. under “the international conventions in force between two countries” and “long-established rules of general international law.”³⁹

In the course of ICJ proceedings, the U.S. adeptly adopted the approach of framing the issue as the community versus individual. For instance, in support for its application for provisional measures, Roberts B. Owen, State Department’s Legal Adviser, argued before the ICJ:

We believe that this case presents the Court with the most dramatic opportunity it has ever had to affirm the rule of law among nations and thus fulfill the world community’s expectation that the Court will act vigorously in the interest of international law and international peace. The current situation in Tehran demands and immediate, forceful, and explicit declaration by the Court, calling upon Iran to conform to the basic rules of international intercourse and human rights. Only in that manner, I respectfully suggest, can the Court discharge its high responsibility under the Charter of the United Nations.⁴⁰

Later, in his oral argument before the ICJ, Owen stressed:

The principle of international law which this Court is being asked to vindicate are of deep concern to *all* states; for they are indispensable to a civilized international order . . . From the point of view of the future of international relations and world peace, the events elaborated in the present record are truly frightening and ominous. Unless the world community takes every possible step toward condemning and discouraging such conduct, the rule of international law will be gravely imperiled.⁴¹

³⁸ *Hostages Case*, Order, *id.*, at 17–18.

³⁹ *Hostages Case*, Judgment, *id.*, at 44.

⁴⁰ Argument of Roberts B. Owen, ICJ Public Sitting, Dec. 10, 1979, Verbatim Record (uncorrected) 44 (Doc. Cr 79/1, 1979), *cited in* Leo Gross, The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phrase of Provisional Measures, 74 *Am. J. Int’l L.* 395 (1980) 397 and n.4.

⁴¹ 80 Dep’t State Bull., Feb. 1980, at 46–47.

According to Janis, the U.S. “probably never entertained great hopes” that the ICJ would play a meaningful role in the crisis simply because Iran was obliged to enforce an ICJ judgment or that Iran would be induced to release the hostages so as to be relieved of the legal obligation to pay the U.S. reparation awarded by the ICJ.⁴² Instead, the ICJ was used as a means for “translating a dispute between the Iran and the United States specially into one between Iran and the international community generally.”⁴³ It appeared that that community versus individual strategy of the U.S. made a real difference. As two commentators observed, those states that were initially reluctant to support the U.S. eventually had to do so “unequivocally.”⁴⁴

The dimension of community versus individual is of particular significance for China. First, China is one of few socialist states in today’s world. The socialist ideology of China makes it a heterogeneous one among about two hundred states. Therefore, China is always at the risk of being portrayed a state potentially challenging the interests and value of other states. Second, China is a rising great power, which has the potential to reshape the current international order. Therefore, some states, especially the current great powers that are prominent in the international community, may strategically conceive that China pursues its own state interest at the expense of the international community.

2.1.2.2 *Politics vs. Law*

The relationship between politics and law is a perpetual issue in legal theories and legal practice. From the perspective of domestic society, the boundary between the legal system and the political system has been demarcated quite clearly. A major reason for this demarcation is to ensure the legal system operate in an independent and impartial manner, being immune from undue intervention from the political system, even though it does not mean that the legal system can and should deny any input from the political system. By contrast, the legal system substantially intervenes in the operation of the political system, placing the political system under legal regulation. In practice, with some exceptions that may involve so-called “political problems,”⁴⁵ most disputes happening in the political system can be settled with judicial means. Arguably, the less involvement in the legal system from the political system is, the more developed the rule of law will be.

⁴² M. W. Janis, *The Role of the International Court in the Hostages Crisis*, 13 *Conn. L. Rev.* 263 (1981) 279.

⁴³ *Id.*, at 280.

⁴⁴ Edward Gordon and Patricia J. Youngblood, *The Role of the International Court in the Hostages Crisis—A Rejoinder*, 13 *Conn. L. Rev.* 429 (1981) 438–439.

⁴⁵ Louis Henkin, *Foreign Affairs and the United States Constitution* (Oxford: Clarendon Press, 2nd ed., 1996) 144–145.

Needless to say, the political system and the legal system are far more intertwined with each other in international society. In particular, political factors have been highly relevant to the operation of the legal system at the international level. As far as the settlement of international disputes is concerned, Emerich de Vattel argued that international judges must not hear “grave matters affecting the safety of the State.”⁴⁶ His opinion suggests that whether certain subject matter can be brought before international courts for determination does not necessarily depend on their nature, that is, whether they have been regulated by international law. The importance of disputes to the security of a state is rather an important factor that needs to be considered. As a result, some subject matter, even though it has been regulated by international law, should not be judicialized; under such circumstances, special arrangements should thus be made. These types of disputes are often referred to as “political disputes.” This conception of political disputes limits the function of international adjudication, which was the “central theme” with most international lawyers in the second half of nineteenth century and remained predominant into the early twentieth century.⁴⁷ According to H. Lauterpacht, however, such a broad understanding of “political disputes” simply leads to “a speedy and radical liquidation of activities” of international courts.⁴⁸ Based upon his cases survey, Lauterpacht observed that “apart from territorial disputes, there are hardly any disputes coming within the description of disputes affecting the State as a whole.”⁴⁹ Indeed, there has been a noticeable trend to narrowly define political disputes since the twentieth century. Those issues once considered as political disputes, including territorial disputes, have been increasingly brought before international courts for determination. The boom of international courts since the second half of twentieth century, especially since the 1990s, represents the trend of the demarcation between the political system and the legal system at the international level, especially the trend that the legal system has increased the capability of containing the political system. In a word, the judicialization of international law is believed to enhance the international rule of law.

However, the trend of judicializing or depoliticalizing international disputes appears to have been somewhat reversed in the past decade. Political factors and considerations appear to have regained and indeed increased their importance in the settlement of international disputes. More and more disputes are viewed through the lens of their political implications—especially national

⁴⁶ See H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) 139.

⁴⁷ *Id.*, at 139, 141.

⁴⁸ *Id.*, at 155.

⁴⁹ *Id.*, at 154.

security implications—so that they should be dealt with special arrangements, and even those disputes are argued to be nonjusticiable. For instance, Article 18 (2) of 2004 U.S. Model BIT now provides that the U.S. should not be precluded from applying measures that “it considers necessary” for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or “the protection of its own essential security interests.” A more difficult issue is that it is now more often assumed that international disputes are intentionally “created” out of political calculations and international adjudication simply as a disguise to pursue broader interests beyond the legal arguments openly proclaimed. People can readily find that the number of national security or “essential security”—related disputes have substantially increased. An eye-catching case is the *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* brought by Iran against the U.S. (*Islamic Republic of Iran v. United States of America*).⁵⁰ In this pending case, the U.S. argues that reimposing nuclear-related economic sanctions in accordance with the presidential memorandum of May 8, 2018, which were lifted pursuant to the Joint Comprehensive Plan of Action, is based on “a core national security decision” and thus falls within the exception for “essential security” provisions of the 1955 Treaty, and therefore the ICJ does not have jurisdiction over the dispute. Iran replied, however, that those sanction measures cannot constitute an exception under the “essential security” provision, and thus the ICJ does have jurisdiction over the dispute.⁵¹ Interestingly, U.S. Secretary of State Pompeo, in commenting on Iran’s ICJ litigation, criticized Iran for allegedly abusing the ICJ “for political and propaganda purposes” by bringing a “meritless” case. He argued that the ICJ has been abused by Iran and used “as a forum for attacking the United States.”⁵²

Two factors presumably play an important role in this reversal. First, some countries find that they have been excessively constrained by the so-called “Golden Straitjacket” of international law and, in particular, international adjudication over the past several decades as they continually involve in international legal order. Although a state has the right to exit itself from international regimes or institutions, such a radical measure may be seen as sending the signal that it does not respect the international rules of law and thus is not always a desirable and effective avenue for expressing discontent.⁵³ An alternative

⁵⁰ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Request for the Indication of Provisional Measures, Order, October 3, 2018.

⁵¹ Order, at 11, 9.

⁵² Remarks to the Media (Secretary of State Michael R. Pompeo) (October 3, 2018), available at <https://www.state.gov/secretary/remarks/2018/10/286417.htm>.

⁵³ For instance, several states from Latin America have withdrawn from the ISDS mechanism. This does not prevent international tribunals from continuing to exercise jurisdiction over investment

and probably better option is to politicize these international disputes. As a result, international judges might be discouraged from exercising jurisdiction or, if they do, they may be forced to exhibit judicial self-constraint. Second, as globalization moves on, human activities tend to affect each other more and more.⁵⁴ More things are thus now being considered with respect to their impact in the political dimension. In recent years, for instance, foreign investment has become more linked with national security.⁵⁵ More generally, there has been a trend in the wake of the 9/11 terrorist attacks, where a growing number of states have significantly strengthened their national security laws, which is associated with a broader conception of national security.⁵⁶ This domestic trend may increase the risk of politicizing the settlement of disputes at international level.

The politics versus law relationship is highly relevant to lawfare. By conceptualizing this relationship in the context of international dispute settlement, a state may argue that an international court is not legally justified to exercise its jurisdiction or, if it does, should pay special attention to the particularities of an international dispute. That state may also accuse that a dispute is created out of political calculation, thereby derogating the legitimacy of international litigation.

2.1.2.3 *Good Faith vs. Bad Faith*

The principle of good faith is unquestionably considered to be a “general principle of law” within the meaning of Article 38 (1)(c) of the ICJ Statute and a general principle of international law.⁵⁷ There is also a consensus, however, that the notion of good faith is inherently abstract. Fitzmaurice argued, for example, that despite the fact that principle could “play a useful part,” there remained a number of difficulties with its application, especially as to “its exact character and extent and the consequences.”⁵⁸ Some authors denied that this principle had any normative authority.⁵⁹ In practice, international courts have long

disputes related to foreign investments that have been made. Diana Marie Wick, The Counter-Productivity of ICSID Denunciation and Proposals for Change, 11 *J. Int'l Bus. & L.* 241(2012) 268. See generally Laurence R. Helfer, Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law, 111 *AJIL Unbound* 425 (2017).

⁵⁴ This trend has led to a famous phenomenon of “. . . related . . . issues.” See Gudrun Zagel, The WTO and Trade-Related Human Rights Measures, 9 *Austrian Rev. Int'l & Eur. L.* 119 (2004).

⁵⁵ See, e.g., James F. F. Carroll, Back to the Future: Redefining the Foreign Investment and National Security Act's Conception of National Security, 23 *Emory Int'l L. Rev.* 167 (2009).

⁵⁶ See Congyan Cai, Enforcing a New National Security? China's National Security Law and International Law, X (1) *JEAIL* 65 (2017).

⁵⁷ Andrew D. Mitchell, M. Sornarajah, and Tania Voon eds., *Good Faith and International Law* (Oxford: Oxford University Press, 2015) 10.

⁵⁸ Citing from Georg Schwarzenberger, Uses and Abuses of the “Abuse of Rights” in International Law, 42 *Transactions Year* 147 (1956) 148.

⁵⁹ Andrew D. Mitchell, M. Sornarajah, and Tania Voon eds., at 14, 15.

been reluctant to rely on the principle of good faith. Rather, “more concrete particularizations,”⁶⁰ for instance, treaty interpretation under Article 31(1) of the VCLT,⁶¹ are needed. In practice, international courts appear to have never directly derived rights and obligations from the good faith principle. Yet, this principle is significant, and it has own separate “legitimate power.” Thus, unsurprisingly, in the *US-Offset Act (Byrd Amendment)* case,⁶² the Appellate Body held that a WTO Member’s violation of treaty provisions itself could not establish that that member “has therefore not act[ed] in good faith . . . , it would be necessary to prove more than mere violation”⁶³ This implies that, although a WTO Member may be found in violation of the WTO discipline, it should not be necessarily accused of acting in bad faith; instead, it may still act in good faith. In other words, an act may be illegal but legitimate, and vice versa.

Good faith closely relates to the prohibition on abusing rights. Indeed, they are often placed together. Article 300 of the UNCLOS, for instance, provides that “State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner would not constitute an abuse of right.” The prohibition on abusing rights has been firmly confirmed in international jurisprudence.⁶⁴ In the opinion of some authors, the prohibition abuse of rights adds little to good faith because it is too imprecise to establish in practice and thus at best it is a more specific expression of the good faith obligation.⁶⁵ However, the prohibition on abusing rights differs significantly from good faith because it clearly presumes that the relevant legal rules already exist to provide the legal rights that might be abused. A disputing party thus may, by relying on the prohibition on abusing rights, argue that a questioned act is not only illegitimate because of the lack of good faith but also potentially illegal because it constituted an abuse of rights. In this sense, Michael Byers rightly maintained that the prohibition on abusing rights supplemented the good faith requirement because it provided “the threshold at which a lack of good faith gives rise to a violation of international law.”⁶⁶

As noted previously, international law, compared with national law, is poor in formal rationality. States often have great discretion to interpret international commitments that they have undertaken, which makes international

⁶⁰ *Id.*, at 9.

⁶¹ *Id.*, Chapter 3.

⁶² Appellate Body Report, United States—Continued Dumping and Subsidy Offset Act of 2000, WTO Doc. WT/DS217/AB/R, WT/DS 234/AB/R (adopted January 27, 2003).

⁶³ *Id.*, para. 298.

⁶⁴ See Michael Byers, Abuse of Rights: An Old Principle, A New Age, 17 *McGill L.J.* 389 (2001–2002) 397–401.

⁶⁵ See *id.*, at 410–411.

⁶⁶ *Id.*, at 412.

law susceptible to being understood and applied in bad faith. A state may find it easy to accuse that another state abuses the rights or fails to honor the obligations in good faith. On the other hand, a state may easily defend itself that it exercises the rights and honors the obligations in good faith. This implies that the term of “good faith” or “bad faith” itself may be susceptible to being understood in bad faith. Thus, Georg Schwarzenberger was right in raising a concern that the “abuse of rights” may be abused.⁶⁷ In a word, the proper functioning of international law depends upon whether or not it is understood and applied in good faith.

This situation is further complicated since international courts, which may hold their own interpretation of what states have consented to, attempt to extend their role in applying international law. According to Byers, judicial discretion and innovation plays an important role in the relatively underdeveloped international legal order.⁶⁸ In doing so, however, international judges risk being blamed by disputing parties for misinterpreting what states consented to. In this sense, international judges who determine whether the good faith obligation has been breached or an abuse of rights has occurred might also raise a concern over whether they are exercising their judicial power in good faith.

In brief, it is the “legitimate power” and inherent uncertainties surrounding what constitutes “good faith” that make this term a good instrument to conduct lawfare. A disputing party may, with or without reference to specific legal provisions, invoke the principle of good faith to sustain its accusation that an international situation is improperly created and international law is not properly understood.

3. Chinese Policies and Practice on International Adjudication

3.1 Chinese Changing Policies on International Adjudication

China has always insisted that a state has the right to choose any means that it deems appropriate to settle international disputes. In a statement issued a day after the SCS Tribunal made its final award, China stated:

Based on an in-depth understanding of international practice and its own rich practice, China firmly believes that no matter what mechanism or means

⁶⁷ Georg Schwarzenberger, at 148.

⁶⁸ Michael Byers, at 413–414.

is chosen for settling disputes between any countries, the consent of states concerned should be the basis of that choice, and the will of sovereign states should not be violated.⁶⁹

However, China has been reluctant to give its consent to international adjudication. For instance, China withdrew its acceptance of the optional jurisdiction offered under Article 36 (2) of the ICJ Statute and to which the ROC had consented since the PCIJ was founded in the 1920s.

In the aforementioned statement, China explains the strength of negotiation:

. . . It is self-evident that negotiation directly reflects the will of states. The parties directly participate in the formulation of the result. Practice demonstrates that a negotiated outcome will better gain the understanding and support of the people of countries concerned, will be effectively implemented and will be durable. Only when an agreement is reached by parties concerned through negotiation on an equal footing can a dispute be settled once and for all, and this will ensure the full and effective implementation of the agreement.⁷⁰

China has indeed signed boundary treaties with twelve of its fourteen land neighbors since 1949. Through negotiation, about 90 percent of China's land boundaries has been delimited and demarcated. In addition, China and Vietnam have delimited through negotiations the boundaries between their territorial seas, exclusive economic zones and continental shelves in the Beibu Bay.⁷¹

China's policy is not unique. More than forty years ago, Cohen and Chiu acknowledged that China's policy was "not uncommon" among states at the time they were reviewing China's policy toward international dispute settlement.⁷² Most states, if not all, prefer not using international adjudication to resolve international disputes because this approach empowers third parties to make binding decisions that may be against the wishes of the state. However, there are several unique factors that, independently or jointly, make China even

⁶⁹ The State Council Information Office of China, China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (hereinafter "Statement of China on Negotiations on the Settlement of the SCS disputes (2016)"), July 13, 2016, para. 129.

⁷⁰ *Id.*, para. 131. See also Statement by Mr. Xu Hong on Agenda Item 75 Report of the International Court of Justice at the 70th Session of the UN General Assembly, November 6, 2015 (Xu Hong, Statement on the ICJ (2015)), available at <http://www.china-un.org/eng/lhghyywj/t1312834.htm> (last visited May 16, 2019).

⁷¹ Statement of China on Negotiations on the Settlement of the SCS disputes(2016), para. 131.

⁷² Jerome Alan Cohen and Hungdah Chiu, at 1443.

more reluctant than many other countries to resort to international adjudication. The Confucian litigation-unfriendly culture can perhaps be considered the first factor.⁷³ Given that Chinese leaders often stress the prominence of Chinese cultural tradition in Chinese foreign affairs, it seems sound to believe that the litigation-unfriendly culture is a major reason for China's reluctance to submit itself to international adjudication. As noted later, however, the so-called litigation-unfriendly culture has no significant influence on how Chinese trade legal officials handle WTO disputes.

Historical reasons may be another major factor. As previously discussed, ⁷⁴China has been only a rule-taker since it encountered international law in the nineteenth century. The lack of substantial participation in international law-making may not only have disadvantaged China directly but also made it difficult for China to properly understand international law, which discourages China from resorting to international courts. However, this explanation is only partly sound since the ROC already accepted the compulsory jurisdiction of the PCIJ and ICJ and appeared before the PCIJ as early as the 1920s.⁷⁵

The third factor concerns socialist ideology. It is well known that China and other socialist countries were historically critical of "Western" international law including international courts. Cohen and Chiu observed that China, as a socialist country, "exhibited an even more profound distrust of institutions for international adjudication."⁷⁶ However, socialist ideology is believed to lose its importance in the settlement of most international disputes as China has been deeply involved in the international legal order.

The fourth factor relates to the subject matter of disputes that China is involved in—China still has disputes with nearly all neighboring countries over territory and maritime demarcations and many of them remain unsettled.⁷⁷ According to Xue Hanqin, an ICJ judge from China, the high sensitivity of

⁷³ See Junwu Pan, Chinese Philosophy and International Law, 1 *Asian JIL* 233 (2011); Au Yeong Wai Mun, International Dispute Resolution: Conflict in Chinese Cultural Context, 26 *Sing. L. Rev.* 77 (2008).

⁷⁴ See Chapter Three, Section 5.2.2.2.

⁷⁵ Denunciation of the Treaty of November 2nd, 1865, between China and Belgium, Publications of the Permanent Court of International Court, Series A.-No. 8, Orders of January 8th, February 15th and June 18th, 1927.

⁷⁶ Jerome Alan Cohen and Hungdah Chiu, at 1443. A Chinese commentator wrote in 1966 that "Imperialism has always considered the general acceptance of the compulsory jurisdiction of the International Court of Justice to be an important signpost on the road to universalism . . . The United Nations has already degenerated into a tool of American imperialism. Can its subordinate organ—the International Court of Justice—do anything better?" *Id.*, at 1444.

⁷⁷ See, e.g., Larry R. Schreier, China's Use of International Law in Border Disputes: The Case of India and the Soviet Union, 2 *Iustitia* 28 (1974); Chi-Kin Lo, *China's Policy Towards Territorial Disputes: The Case of the South China Sea Islands* (London: Routledge, 1989); Junwu Pan, *Toward A New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Leiden: Martinus Nijhoff Publishers, 2009).

China-involved disputes is an important reason for China's reluctance to apply international law.⁷⁸

The final factor is that there are few highly qualified international legal professionals in China, which is mentioned in Chapter Four. This shortage is magnified because legal professionals play a more important role in international adjudication than their role in treaty negotiations, because international judges have the ability to make a binding decision, determining the facts and legal claims concerning a dispute.

That being said, China has become more friendly with international adjudication since the 1990s. For instance, China praised the ICJ in 2005, stating:

... The International Court of Justice, one of the six main organs of the United Nations, is indispensable for the maintenance of international peace and security. At the same time the ICJ as the judiciary organ of the United Nations, by exercising its jurisdiction and issuing advisory opinions, plays a critical role in the clarification, affirmation, application, and development of the principles and rules of international law.

... We are confident that the ICJ will continue to play an important role in the peaceful settlement of international disputes, the promotion of the rule of law at international levels and in building a harmonious community of nations. China will continue to support the work of the ICJ. It is our hope that the Court will make greater contribution to the maintenance of international peace and security, the promotion of friendly exchanges among countries and the development of international law.⁷⁹

In light of human and financial difficulties that the ICJ faces, China supports that "the ICJ should have necessary resources corresponding to its status and role within the UN framework, which is essential for its effective operation and high-quality judicial activities."⁸⁰

⁷⁸ Interview with Judge Xue Hanqin by Professor Leila Sadat, available at <https://www.youtube.com/watch?v=n3uMucGOaiY> (last visited May 17, 2019).

⁷⁹ Statement by Mr. Liu Zhenmin, Director-General of Department of Treaty and Law, Ministry of Foreign Affairs of China, at the Plenary of the 60th Session of the UN General Assembly, on Item 74: Report of the International Court of Justice (October 27, 2005), available at <http://www.china-un.org/eng/chinaandun/legalaffairs/sixthcommittee1/t560743.htm> (last visited May 17, 2019).

⁸⁰ Statement by Mr. Xu Hong On Agenda Item 75 Report of the International Court of Justice at the 70th Session of the UN General Assembly (November 6, 2015) (hereinafter "Xu Hong, Statement on the ICJ (2015)"), at <http://www.china-un.org/eng/lhghyywj/t1312834.htm>. See also Statement by Mr. Xu Hong Chinese Delegate, Director General of the Ministry of Foreign Affairs of China at the 71st Session of the UN General Assembly on Agenda Item 70 Report of the International Court of Justice (October 27, 2016) (hereinafter "Xu Hong, Statement on the ICJ (2016)"), available at <http://www.china-un.org/eng/chinaandun/t1411699.htm> (last visited May 17, 2019).

China also has begun to involve itself in international adjudication. For example, China accepted the WTO dispute settlement mechanism, which was deemed a major “price” that China paid for its WTO membership. Today, China claims that the DSB is “the crown jewel of the WTO” and has become “one of the most efficient and effective dispute settlement mechanisms in the history of international law.”⁸¹ Without the DSB, China claimed “the WTO trade rules will no longer be effectively enforced, and the trust and credibility of the multilateral trading system will be deeply undermined.”⁸² This attitude implies that resorting to the DSB is no longer considered a challenge for China. Instead, it now appears that China considers it an important instrument to defend the trade rights and interests within the WTO mechanism.

For some international lawyers, the acceptance of DSB jurisdiction represents a turning point in China’s policies and practices on international adjudication. Eder had high expectations and predicted that once China “feels confident in a particular” system, it “gradually but inevitably boots up participation at court.”⁸³ However, more authors are not so optimistic. As Ku wrote:

What then should we make of the PRC’s willingness to join the ICSID, UNCLOS, and WTO DSB systems? In my view, the PRC’s willingness to subject itself to the WTO DSB is simply a price of admission to the WTO. It is worth noting that when given an opportunity, the PRC will always choose the most limited compulsory jurisdiction possible, as it did in the UNCLOS system.⁸⁴

Most Chinese observers appear to agree with Ku. A Chinese trade legal official suggested:

[A]t this stage, it is too early and would be premature to say that China’s overall attitude binding international adjudication has dramatically changed simply because of China’s acceptance of the legally binding nature of the WTO dispute settlement system. Indeed, acceptance by China of the WTO dispute settlement system may be just an exception, and there is no apparent and clear

⁸¹ Statement by H.E. Ambassador Dr. Zhang Xiangchen at the WTO General Council Meeting (May 8, 2018) (hereinafter “Ambassador Zhang Xiangchen, Statement of May 8, 2018”), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoints/201805/20180502741686.shtml> (last visited May 17, 2019).

⁸² *Id.*

⁸³ Thomas Eder, *China Leans in on International Adjudication: Why Beijing’s Answer to Defeat Will Be More Powerful Engagement*, *EJIL Talk*, May 2, 2018.

⁸⁴ Julian Ku, at 171.

indication that China is willing to accept the compulsory jurisdiction of other major tribunals at the international level.⁸⁵

Notably, China has begun to pay close attention to how international judges exercise their judicial power. As I noted earlier, the SCS arbitration has intensified this concern. In October 2016, three months after the SCS Tribunal rendered the final award, Xu Hong, then Director-General of China's MFA Department of Treaty and Law and now China's ambassador to the Netherlands, in reviewing the working report annually prepared by the ICJ, pointed out at the UN General Assembly that

we can see that it is no coincidence that the ICJ has been successful. In exercising its jurisdiction, the Court has always acted prudently and strictly abided by the principle of "consent of state". The judges of the ICJ, who represent major cultures and principal legal systems of the world, have maintained a high level of professionalism, a responsible attitude and a balanced judicial approach. The judges and internal administrative organs such as the Registry have always kept their independence free from external interference and influence. By reporting to the General Assembly and the Security Council on a periodic basis and listening to the views and comments of member states, the ICJ has, to a certain extent, made it possible for the international community to exercise oversight of the Court's work. All of the above have laid a solid foundation for the ICJ to carry out its high-quality judicial activities on the basis of objectivity and fairness.⁸⁶

Xu presented for the first time what constitutes China's conception of "good" international adjudication. First, international judges should fully respect the consent of states rather than create consent for states. Second, international judges should be highly professional and should have significant international law knowledge.⁸⁷ They also should be sensitive to particular factors related to the disputes, political, historical, cultural, and so on.⁸⁸ Third, international

⁸⁵ Wenhua Ji and Cui Huang, at 37. Wenhua Ji is a senior legal staff member of the MOC of China.

⁸⁶ Xu Hong, Statement on the ICJ (2016).

⁸⁷ Article 2 of the ICJ Statute provides that the Court "shall be composed of a body of . . . judges, . . . who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

⁸⁸ Article 9 of the ICJ Statute provides that "at every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

Article 14 of the ICSID Convention provides that "(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the

judges should be independent and impartial.⁸⁹ They should be immune from external interference and influence. Fourth, there should exist internal and external checks and balances to ensure that international judges duly exercise their judicial power.

According to Ku, both the U.S. and China take a negative approach to limit their involvement in international adjudication. He suggested that such an approach “may limit the growth and influence of international adjudication in the long term.”⁹⁰ This argument is, however, open to debate. First, international adjudication is not always a desirable means to settle international disputes. International disputes that happen between two individual states often involve highly sensitive subject matter or affect a huge population. Therefore, the conventional thinking that more courts means more justice, which originates from domestic society, does not necessarily apply in international relations. Second, apart from their acceptance of international adjudication, great powers can provide other substantial support to international adjudication such as political and financial support, which other states cannot do. These supports can enhance the authority and efficiency of, and confidence in, international adjudication.

It should be noted that, at least in a particular time, the rejection or acceptance of international adjudication does not necessarily mean that China has a clear conception of benefits and costs arising from that policy. For instance, it was not until August 2006, ten years after the UNCLOS came into force in China in June 1996, that China made a declaration pursuant to Article 298 of the UNCLOS stating that China would not accept any of the compulsory jurisdiction laid down in the UNCLOS, including compulsory arbitration as to disputes concerning maritime delimitation, historic bays or titles, military and law enforcement activities, and so on.⁹¹ This declaration implies that when China ratified the UNCLOS in 1996, it was not aware of the potential litigation risk stemming from that ratification.

field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.”

⁸⁹ Article 2 of the ICJ Statute provides that the Court “shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character . . .”

⁹⁰ Julian Ku, at 155.

⁹¹ The Declaration reads: “The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.” See United Nations Convention on the Law of the Sea: Declarations made upon signature, ratification, accession or succession or anytime thereafter: China, available at http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China Upon ratification (last visited May 17, 2019).

3.2 China's Practice in International Adjudication

China's practice in international adjudication can be examined from three perspectives, including that (1) China participates in international adjudication as a disputing party; (2) China is involved in international adjudication as a nondisputing party; and (3) China endeavors to reform international adjudicatory mechanisms.

Although China has appeared, in different capacities, before several international adjudicatory bodies, including the ICJ, the ITLOS, the ISDS tribunals, and the DSB of the WTO, China's experience in the DSB is the best example with which to illustrate China's practice on international adjudication. China's engagement with the DSB provides a full story of how China has grown from an observer to an active player in international adjudication.

First, China regularly appears before the DSB as either a respondent or as a complainant. During the first several years after its accession to the WTO, China was cautious about engaging with DSB proceedings. For instance, China reached a settlement soon after the *China—Value-Added Tax* case,⁹² which was China's first WTO case, was initiated by the U.S. Indeed it was not until 2007, six years after China obtained WTO membership, that China filed its first WTO claim⁹³ in the *US—Preliminary Anti-dumping and Countervailing* case.⁹⁴

It is quite understandable that China has maintained caution toward the DSB proceeding because as a late participant to the WTO, it does not have much knowledge about how DSB proceedings are conducted. Yang Guohua, a senior legal official responsible for handling the *U.S.—Steel Safeguards* case in which China was one of nine co-complainants, described how China participated in that case. Yang recalled an episode which occurred at a meeting room at the WTO headquarters:

The appearances of the people from China, a country which has only become a member of the WTO for only a few months, were very serious. They looked

⁹² China—Value-Added Tax on Integrated Circuits, Request for Consultation by the United States, WT/DS309/1, G/L/675, S/L/160, March 23, 2004; China—Value-Added Tax on Integrated Circuits, Joint Communication from China and the United States, WT/DS309/9, G/L/675/Add 1, S/L/160/Add 1, July 16, 2004.

⁹³ In 2002, China, together with the EU, Japan, Korea, Switzerland, Norway, New Zealand, and Brazil, brought a case against the U.S. United States—Definitive Safeguard Measures on Imports of Certain Steel Product, Request for Consultation by China, G/L/532, G/SG/D223/1, WT/DS252/1, April 2, 2002. However, a Chinese trade official admitted that “as one of the joint complaints, we could not contribute much to this case.” Yang Guohua, at 2.

⁹⁴ United States—Preliminary Anti-dumping and Countervailing Duty Determination on Coated Free Sheet Paper from China, Request for Consultation by China, G/ADP/D72/1, G/L/826, G/SCM/D77/1, WT/DS 368/1, September 18, 2007.

around the room and found very few familiar faces. They glanced at the seats of the United States, the respondent of that case, with a sense of hostility.

. . . When I was seated, I realized that the tables of the people from all the other eight members were covered with documents and materials, while only a few pieces of papers, including the name of different delegations, were in front of my Chinese colleagues . . .

What happened next was nothing difficult to image. For two days, other people asked the U.S. delegation a large amount of question on the facts of its measure, . . . while we listened and became increasingly puzzled after the head of our delegation finished reading the half page of statement in front of him. It was a real suffering for me. As one of joint complaints, we could not contribute much to this case. We could not even understand what they were talking about! We did not know that the consultation was a perfect opportunity to have the U.S. to clarify the measure which we claimed to be inconsistent with the WTO rules, and that it would greatly facilitate the following procedures to resolve the dispute. We did not even know to bring with us a copy of the USITC Report.⁹⁵

Since 2007, however, the WTO has witnessed several “Chinese years”: in 2007, a total of 13 disputes were filed in the WTO, five of which involved China; in 2008, China was involved in one-third of WTO disputes; in 2009, China was involved in half of all WTO disputes.⁹⁶ As of July 2018, China has brought seventeen cases and has been sued forty-one times before the DSB.⁹⁷ Chinese trade legal officials, in their review of China’s first ten years of experience in WTO litigation, contended that “[i]n a sense, China, for the first time, has the potential to determine how busy the WTO dispute settlement system will be . . .”⁹⁸ China has become more skilled in taking advantage of the DSB procedure. Chinese legal officials are now experienced in considering various factors, such as the importance of the subject matter and the trade measures in question, and further make decisions, including which means (negotiation or litigation) will be finally chosen, which WTO Member will be targeted, what subject matter will be focused on, when a WTO claim will be raised, and how the dispute settlement process will proceed.⁹⁹

According to Yang’s memoir about how he dealt with the *U.S.-Poultry* case,¹⁰⁰ which China initiated in 2009, China had substantially improved

⁹⁵ Yang Guohua, at 1–2.

⁹⁶ Yen Kong Ngangjoh and Zhang Qi, at 133.

⁹⁷ “Disputes by member,” available at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited October 1, 2018).

⁹⁸ Wenhua Ji and Cui Huang, at 37.

⁹⁹ *Id.*, at 30–36.

¹⁰⁰ United States—Certain Measures Affecting Imports of Poultry from China, Request for Consultation from China, G/L/886, G/AG/GEN/84, G/SPS/GEN/919, April 21, 2009.

its legal ability to handle WTO disputes compared with that in the *U.S.-Steel Safeguards* case. Yang recalled:

. . . we asked a series of questions on the measure. As the head of the Chinese delegation, I had all the related documents in front of me, . . . But can you imagine? Even though we sat face-to-face with the U.S. delegation, the two sides were actually thousands of miles away, on in Beijing and the other in Washington D.C.! What we were having was a digital video conference (DVC), a more cost-effective way to communicate. After a few hours of Q&A, the consultations were concluded when I came to believe that we had exhausted all the question and found out all the facts available. When I walked out of the DVC room in late that night, I saw the roadmap ahead of me every clearly and knew how to work on the case.¹⁰¹

Second, China often participates in the WTO cases as a third party. In order to learn how other WTO Members, such as the EU and the U.S., handle WTO disputes, China, as a third party, participated in nearly all WTO cases from 2003 to 2007.¹⁰² Although China has invested more resources in filing claims as complainants and defending itself as respondents since 2007, it still often appears before the DSB as a third party. By July 2018, China has been a third party in 147 WTO cases, a number that surpasses the U.S. (143) and places China as the third largest third party next to Japan (179) and the EU (174).¹⁰³ China's intensive participation in the DSB proceeding as a third party is also justified by the fact that China, as a major trade power, has a potential interest in how WTO rules are interpreted even in disputes to which China is not a party.

China's third-party experience participating in the DSB inspires China to increase its participation in several other international courts in a similar capacity. Such participation also allows China to improve its ability to engage international courts without being a disputing party. For instance, in April 2009, China submitted and presented a statement in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.¹⁰⁴ This was the first time that China appeared before the ICJ since 1972 when the PRC took over the capacity to represent China in the UN. In August 2010

¹⁰¹ Yang Guohua, at 2–3.

¹⁰² Wenhua Ji and Cui Huang, at 25.

¹⁰³ "Disputes by member," available at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

¹⁰⁴ Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo, the Hague, April 16, 2009; Verbatim Record, held on Monday December 7, 2009, at 10 a.m., at the Peace Palace, CR 2009/29; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, at 403.

and November 2013, China submitted to the ITLOS written statements called *Responsibility and Obligations of States with respect to activities in the Area*,¹⁰⁵ and *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, respectively.¹⁰⁶ In March 2018, China appeared again before the ICJ by submitting a written statement in the *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*.¹⁰⁷ Looking at the history of China's litigation experience with the WTO, there should have been no surprise China would appear before the ICJ or the ITLOS someday.

Third, China is active in the deliberations on DSB reform. Immediately after it became a WTO Member, China, as "one of the largest trading nations," presented its position supporting DSB reform. China argued that the DSB reforms should especially reflect "the interests of the developing-country Members."¹⁰⁸ To this end, China suggested the inclusion of a new provision regarding S&D treatment in the DSU.¹⁰⁹ China also proposed that the DSU facilitate disputing parties, finding mutually acceptable solutions in implementing the recommendations of the DSB rather than encouraging them to suspend trade concession. In particular, China stated that the potential failures by developed country members in their obligations toward developing country members must be addressed. In order to discourage the tendency to abuse trade remedy measures, China recommended shortening the time frame for dispute settlement.¹¹⁰ China also supported that third parties can be allowed more involvement in DSB proceedings, such as their right to be present at all substantive meetings of panels of the DSB.¹¹¹ However, beginning in 2007 China no

¹⁰⁵ *Responsibility and Obligations of States with respect to activities in the Area*, Advisory Opinion, February 1, 2011, ITLOS Report 2011, at 10, Written Statement of the People's Republic of China, August 18, 2010.

¹⁰⁶ *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, April 2, 2015, ITLOS Reports 2015, at 4. Written Statement of the People's Republic of China, November 26, 2013.

¹⁰⁷ *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)*, ICJ, Written Statement of the People's Republic of China, March 1, 2018.

¹⁰⁸ Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communication from China, January 22, 2003, TN/DS/W/29.

¹⁰⁹ The S&D provision mainly includes that (1) developed country members shall exercise due restraint in cases against developing country members; (2) the legal costs of a developing country member shall be borne by a developed country member if the claims brought by the latter against the former are not affirmed by the DSB; and (3) developed country members shall, by providing technical assistance and capability building, help developing country members better employ the DSB procedure. *Id.* See also Special Amendment to the Dispute Settlement Understanding—Drafting Inputs from China—Communication from China, March 5, 2002, TN/DS/W/51.

¹¹⁰ *Id.*

¹¹¹ Special Amendment to the Dispute Settlement Understanding—Drafting Inputs from China—Communication from China, March 13, 2003, TN/DS/W/51/Rev.1.

longer put forward proposals on its own but tended to side with other developing country members' efforts to enhance the DSB reform.¹¹²

3.3 China and Lawfare

According to Kittrie, there is a "gene" of lawfare in China's instrument-oriented conception of law, which is inherent in Confucian-Legalist cultural tradition and socialist ideology.¹¹³ In Kittrie's view, China is actually quite adept at conducting lawfare and constantly practices it in various fields ranging from maritime affairs and aviation to outer space and nonproliferation.¹¹⁴ Kittrie contended:

Although the United States is a far more law-oriented society, with a much higher percentage of its best minds going into the legal field, the PRC is currently waging lawfare much more diligently and systematically than is the United States. While the United States seems far better suited to be a lawfare superpower, it is currently leaving the field disproportionately to the PRC.¹¹⁵

Kittrie predicted that as China increasingly engages with the international legal order and China continually improves its legal capability, it "will likely become far more adept at waging lawfare over the coming decades."¹¹⁶ In order to engage China's potential lawfare, Kittrie put forward more than ten suggestions to the U.S. and its allies.¹¹⁷

However, Kittrie's predictions and claims about China and lawfare is unsound in theory and unfounded in practice. Because Kittrie held a very

¹¹² Wenhua Ji and Cui Huang, at 29.

¹¹³ Orde F. Kittrie, at 163.

¹¹⁴ *Id.*, at 165–185.

¹¹⁵ *Id.*, at 161.

¹¹⁶ *Id.*, at 186.

¹¹⁷ They include: (1) weigh new obligations in light of lawfare risks; (2) prepare for China's battle-field lawfare; (3) prepare to systematically identify and publicize China's violations; (4) emulate China's seriousness about lawfare; (5) identify potential U.S. and allied points of lawfare leverage over China; (6) assess advantages and disadvantages of various types of offensive U.S. lawfare against China; (7) prepare for China-instigated civil litigation and universal jurisdiction lawfare; (8) identify and prepare for China's next steps in current lawfare arenas; (9) identify and prepare for China waging lawfare in new arenas; (10) minimize exploitable differences between allies; (11) consider whether useful options exist for agreements to limit lawfare; and (12) maximize current U.S. pre-eminence in shaping international law. Orde F. Kittrie, at 191–195; Dean Cheng, "Winning without Fighting: The Chinese Psychological Warfare Challenge," *The Heritage Foundation* (July 11, 2013), available at <https://www.heritage.org/global-politics/report/winning-without-fighting-the-chinese-psychological-warfare-challenge> (last visited May 17, 2019).

liberal conception of what defined lawfare, it seems that he identified nearly all Chinese legal activities as lawfare. As I suggested previously, however, such a liberal conception makes the term “lawfare” meaningless. In practice, Kittrie failed to distinguish between the potential to conduct lawfare and the capability to conduct lawfare. Effectively conducting lawfare is preconditioned on a state being highly effective at using international law to its advantage. China, as a country that only began to substantially engage with the international legal order in the 1990s, is far from being a sophisticated player in international legal order, at least for the time being.

Indeed, as early as the 1990s, Jiang Zemin, a former president of China, required that China be adept at using international law as a “weapon” to defend China’s state interests.¹¹⁸ A subsequent regulation approved by the People’s Liberation Army (PLA) in 2003 stipulates that the PLA should take advantage of “legal warfare,” together with “psychological warfare” and “media warfare.”¹¹⁹ Two researchers with military backgrounds, Qiao Liang and Wang Xiangshui, explicitly used the term “legal warfare” (*fa lü zhan*) in their renowned book, *Unlimited War*, published in 1999,¹²⁰ two years before Dunlap published his paper on lawfare in 2001. However, mere occasional mentions of “legal warfare” do not mean that China necessarily attaches great importance to lawfare in international affairs. Although the 2003 regulation of the PLA mentioned the term “legal warfare,” it did not further clarify what that means or how the “legal warfare” should be conducted. Qiao Liang and Wang Xiangshui likewise merely stressed the importance of “legal warfare” without any further theoretical debates.

Importantly, the SCS arbitration made China recognize the significance of lawfare. China has begun to significantly increase resources invested to enhance its capability building in the field of international law. For instance, the PLA Academy of Military Science established the Martial Law Institute (MLI) in 2017, which is expected to provide legal support for China’s future military operations.¹²¹

¹¹⁸ Citing from Dong Wang, *China’s Unequal Treaties: Narrating National History* (Lanham: Lexington Books, 2008) 128.

¹¹⁹ Central Committee of the CCP and Central Military Commission of China, People’s Liberation Army of China Regulation on Political Work, December 5, 2003, art. 14(18).

¹²⁰ Liang Qiao and Xiangshui Wang, *Unlimited War* (Wuhang: Changjian Literature and Art Press, 1999) (in Chinese).

¹²¹ Martial Law Institute of Academy of Military Science, Opening a New Page of Martial Law Research, available at http://www.mod.gov.cn/jmsd/2017-11/21/content_4797878.htm (last visited May 17, 2019).

4. Lawfare in the China-Philippines SCS Arbitration and the China-U.S. Trade War

By any standard, the China-Philippines SCS arbitration (2013–2016) and the ongoing China-U.S. trade war that broke out in early 2018 should be regarded as crises for China and even for the whole international community. Accordingly, how international law is used in these two situations should be examined with respect to the use of lawfare. China openly claims that the SCS arbitration is lawfare waged by the Philippines to deny China's rights and interests in the SCS. According to Ma Xinmin, then deputy director general of China's MFA and now China's ambassador to Sudan, lawfare is the base of all measures that China has taken to engage the SCS arbitration.¹²² Many international observers also treat the SCS arbitration as an important case of lawfare.¹²³ The lawfare in the SCS arbitration is of particular significance because China declined to appear before the SCS Tribunal. In comparison, China conducts lawfare against the trade war initiated by the U.S., while in the SCS arbitration it uses "counter-lawfare" against the lawfare waged by the Philippines.

4.1 Background

4.1.1 China-Philippines SCS Arbitration

The SCS is situated south of China's mainland, connected by narrow straits and waterways, with the Pacific Ocean to the east and the India Ocean to the west.¹²⁴ It covers an area of about 3.5 million square kilometers and includes four groups of islands consisting of islands, islets, reefs, shoals, rocks, and cays, which are known as the Dongsha Islands (Pratas Islands), Xisha Islands (Paracel Islands), Zhongsha Islands, and Nansha Islands (Spratly Islands). There are six countries around the SCS, including Brunei, China, Indonesia, Malaysia, the Philippines, and Vietnam. The SCS countries and many other countries outside the area have recognized that the SCS has important strategic value, as a vital

¹²² Ma Xinmin, *Fighting Lawfare Outside the Tribunal: Retrospect and Prospect of China's Legal Response to the South China Sea Arbitration*, 2 (2) *J. Boundary & Ocean Aff.* 17 (2017) 17 (in Chinese).

¹²³ See, e.g., Patrick M. Renz and Frauke Heidemann, "China's Coming 'Lawfare' and the South China Sea" (May 8, 2015), available at <https://thediplomat.com/2015/05/chinas-coming-lawfare-and-the-south-china-sea/>; Carlyle A. Thayer, "After the Ruling: Lawfare in the South China Sea", available at <https://www.c3sindia.org/archives/after-the-ruling-lawfare-in-the-south-china-sea-by-carlyle-a-thayer/>; Mark J. Valencia, "China, US Both Using Lawfare in the South China Sea", available at <https://thediplomat.com/2017/10/china-us-both-using-lawfare-in-the-south-china-sea/> (last visited May 17, 2019).

¹²⁴ Statement of China on Negotiations on the Settlement of the SCS disputes(2016), para. 1.

route of trade and transportation, a vast area with abundant living and non-living resources, and a major battlefield for bargains among great powers.¹²⁵

Chinese people are “the first to have discovered, named, and explored and exploited” the Nansha Islands and the relevant waters, which can be dated back to more than two thousand years ago.¹²⁶ The Chinese government has “peacefully and effectively exercised sovereignty and jurisdiction over them,” including when in the 1940s the ROC revised the geographical names of SCS islands, compiled a Brief Account of the Geography of the SCS islands, and drew the Location Map of the SCS islands with dotted lines.¹²⁷ Therefore, China’s sovereignty over the Nansha Islands and the relevant rights and interests in the South China Sea “have been established in the long course of history, and are solidly grounded in history and law.”¹²⁸ Furthermore, China and the Philippines did not dispute territorial or maritime delimitation in the SCS before the 1970s. Since the 1970s, however, the Philippines has begun to occupy some of the Nansha Islands. Furthermore, the disputes over maritime delimitation in the SCS area emerged in the wake of signing the UNCLOS in 1982.¹²⁹

Admittedly, China has held several rounds of consultations with the Philippines to discuss how to resolve the relevant disputes but has not initiated any official negotiations. Furthermore, the two countries have made “solemn commitment” to settle relevant disputes through negotiation in the DOC of 2002.¹³⁰ Because of this, China has complained that the Philippines, by “unilaterally” initiating the SCS arbitration on January 22, 2013, totally disregarded the relevant consensus and commitment to resolve disputes through negotiation.¹³¹ China firmly contends that the Philippines has no right to initiate international proceedings against China. China thus rejected and returned the Philippines’ note together with an attached Notification and Statement of Claim on February 19. China then issued a position paper on the jurisdiction of the SCS arbitration (Position Paper of China on the SCS Arbitration Jurisdiction (2014)) on December 7.¹³² In that document, China stated that it would “neither accept nor participate in” the arbitration proceeding,¹³³ since China has rejected any international tribunals considering subject matter involving

¹²⁵ Zhiguo Gao and Binbin Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 *Am. J. Int’l L.* 98 (2013) 99–100.

¹²⁶ Statement of China on Negotiations on the Settlement of the SCS disputes(2016), para. 3.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*, paras. 4, 58–61, 69–72, 93–114.

¹³⁰ *Id.*, paras. 5, 80–83.

¹³¹ *Id.*, para. 6.

¹³² MFA, Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (December 7, 2014).

¹³³ *Id.*, para. 1.

China's territorial sovereignty over maritime delimitation in the SCS, and also since the Philippines and China previously agreed to settle the relevant disputes through negotiations.¹³⁴ The SCS Tribunal rendered a decision on jurisdiction on October 29, 2015, deciding that the Tribunal had the jurisdiction over the dispute.¹³⁵ As a response, China immediately issued a statement,¹³⁶ strongly protesting the decision and arguing that the award was "null and void" and thus had "no binding effect on China" and reaffirming its policy of "non-acceptance and non-participation."¹³⁷ On July 12, 2016, the SCS Tribunal rendered the final award in favor of the Philippines.¹³⁸ On the same day, China issued a statement,¹³⁹ stating that the final award was also "null and void" with "no binding force" and stated that China "neither accepts nor recognizes" it.¹⁴⁰

In addition, China issued two other statements. In the first statement, which was also issued on July 12, 2016,¹⁴¹ China explicitly claimed that China's maritime rights and interests in the SCS include "inter alia: i. China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Quando, Zhongsha Qundao and Nansha Qundao; ii. China has internal waters, territorial sea and contiguous zone, bases on Nanhai Zhudao; iii. China has exclusive economic zone and continental shelf, based on Nanhai Zhudao; iv. China has historical rights in the South China Sea."¹⁴² In the other statement explaining China's position on the settlement of the SCS disputes with the Philippines,¹⁴³ China discussed the background and evolution of the disputes, the consensus, and the commitment that the two countries have reached to settle the disputes, and China's constructive policy and approach toward the settlement of SCS disputes.

Rodrigo Roa Duterte won the Philippine presidential election on May 9, 2016, two months before the SCS Tribunal rendered the final award. President Duterte declared that his SCS policy would be substantially different from that pursued by former President Benigno Aquino III, who initiated the SCS

¹³⁴ *Id.*, Part II, Part III, and Part IV.

¹³⁵ Award on Jurisdiction and Admissibility, PCA Case No. 2013–19, October 29, 2015.

¹³⁶ MFA, Statement on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (October 10, 2015) (hereinafter "Statement of China on the Award on Jurisdiction and Admissibility (2015)").

¹³⁷ *Id.*

¹³⁸ Award, PCA Case No. 2013–19, July 12, 2016 (hereinafter "Final Award of the SCS (2016)").

¹³⁹ MFA, Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of Philippines (July 12, 2016) (hereinafter "Statement of China on the SCS Final Award (2016)").

¹⁴⁰ *Id.*

¹⁴¹ Statement of the Government of the People's Republic of China on China's Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (July 12, 2016).

¹⁴² *Id.*

¹⁴³ Statement of China on Negotiations on the Settlement of the SCS disputes (2016).

arbitration. Duterte openly acknowledged that he did not believe that an international determination, such as a tribunal award, could effectively engage China. In October, Duterte held a state visit to China. Interestingly, in the Joint Statement issued by the two governments at the close of that visit (China-Philippines Joint Statement (2016)), there appeared no mention of the SCS arbitration, let alone any requirement for China to implement the SCS award.¹⁴⁴ Instead, the Joint Statement stressed:

40. Both sides exchange views on issues regarding the South China Sea. Both sides affirm that contentious issues are not the sum total of the China-Philippines bilateral relationship. *Both sides exchange views on the importance of handling the disputes in the South China Sea in an appropriate manner. Both sides also reaffirm the importance of maintaining and promoting peace and stability, freedom of navigation in and over-flight above the South China Sea, addressing their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the Charter of the United Nations and the 1982 UNCLOS* (italic added).

41. Both sides recall the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) and the Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the DOC adopted in Vientiane on 25 July 2016. Both sides commit to the full and effective implementation of DOC in its entirety, and work substantively toward the early conclusion of a Code of Conduct in the South China Sea (COC) based on consensus.

42. Both sides agree to continue discussions on confidence-building measures to increase mutual trust and confidence and to exercise self-restraint in the conduct of activities in the South China Sea that would complicate or escalate disputes and affect peace and stability. In this regard, *in addition to and without prejudice to other mechanisms, a bilateral consultation mechanism can be useful, which will meet regularly on current and other issues of concern to either side on the South China Sea*. Both sides also agree to explore other areas of cooperation.¹⁴⁵

¹⁴⁴ Joint Statement of the People's Republic of China and the Republic of the Philippines (October 21, 2016) (hereinafter "China-Philippines Joint Statement (2016)").

¹⁴⁵ *Id.*

In the words of China, the SCS award is “nothing more than a piece of a waste paper”¹⁴⁶ and the SCS arbitration “has already been turned over as a page of history.”¹⁴⁷ However, this is only China’s viewpoint. In point of fact, the SCS award is likely to be used by the Philippines and other countries as leverage against China in the coming years. For instance, in commenting on the meeting between President Duterte and Vietnamese Prime Minister Nguyen Xuan Phuc on April 27, 2018, the spokesman for the Philippines argued that the Philippine president “has not abandoned, he is not reneging, he is not relinquishing, he is not in any way ignoring the arbitration [award] and he considers it as a binding arbitral decision in favor of the Philippines.”¹⁴⁸ China should recognize that the SCS arbitration will continue to be a challenge for it in the future. Accordingly, the lawfare stemming from the SCS arbitration may not cease with the close of the SCS proceeding. China might find that it has to continually employ various instruments to engage in the lawfare resulting from the SCS arbitration. According to the China-Philippines Joint Statement (2016), for instance, it appears that China has made a range of promises in return for the Philippines’ new policy of “setting aside” the SCS arbitration.¹⁴⁹

4.1.2 China-U.S. Trade War

Trade disputes between China and the U.S. are certainly nothing new. Since the 1990s trade disputes have been a recurring issue, provoking endless quarrels among politicians, trade officials, and commentators.¹⁵⁰ Since the 2010s, however, China-U.S. trade disputes have become much more severe than before. More commentators have recently started to use the term “trade war” in their analysis on China-U.S. trade disputes.¹⁵¹ China has openly proclaimed

¹⁴⁶ Vice Foreign Minister Liu Zhenmin at the Press Conference on the White Paper Titled China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea (July 13, 2016), available at http://www.fmprc.gov.cn/nanhai/eng/wjbxw_1/t1381980.htm (last visited May 17, 2019).

¹⁴⁷ Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on May 18, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1463251.shtml.

¹⁴⁸ “Duterte ‘not abandoning’ court victory against Beijing over South China Sea areas, says spokesman,” available at <https://www.scmp.com/news/asia/southeast-asia/article/2143781/duterte-not-abandoning-court-victory-against-beijing-over> (last visited May 17, 2019).

¹⁴⁹ China-Philippines Joint Statement (2016), paras. 16, 17, 24, 29, 30, 31.

¹⁵⁰ See, e.g., Jill M. Brannelly, The United States’ Grant of Permanent Normal Trade Status to China: A Recipe for Tragedy or Transformation, 25 *Suffolk Transnat’l L. Rev.* 565 (2001–2002); Pasha L. Hsieh, China-United States Trade Negotiations and Disputes: The WTO and Beyond, 4 *Asian J. WTO & Int’l Health L. & Pol’y* 369 (2009); Dong Wang, U.S.-China Trade, 1971–2012: Insights into the U.S.-China Relationship, 24 (4) *Asia-Pac. J.* 1 (2013).

¹⁵¹ See, e.g., Kara Loridas, United States–China Trade War: Signs of Protectionism in a Globalized Economy, 34 *Suffolk Transnat’l L. Rev.* 403 (2011); Daniel Chow, China’s Coming Trade War with the United States, 81 *UMKC L. Rev.* 257 (2012–2013).

that the year of 2018 saw “the biggest trade war” in history initiated by the U.S.¹⁵²

The China-U.S. trade war is essentially the result of the huge trade imbalance between China and the U.S. According to the U.S., its trade deficit in goods with China amounted to US\$395.8 billion by 2017.¹⁵³ In his presidential campaign in 2016, Donald Trump pledged that, if elected, he would significantly reduce the massive trade deficit with China by implementing various measures.¹⁵⁴

President Trump wants to keep the promise made in the presidential campaign, and accordingly, issued a memorandum on those promises on August 14, 2017.¹⁵⁵ In that memorandum, Trump required the USTR to determine whether the U.S. would initiate an investigation in accordance with Section 301 of the Trade Act of 1974 on China’s relevant trade laws, policies, practices, or actions.¹⁵⁶ The USTR initiated a Section 301 investigation on August 18.¹⁵⁷ China immediately expressed its “strong dissatisfaction” toward the Section 301 investigation, urging the U.S. to “act prudently and respect the facts, the strong cooperation will of industries from both countries, and multilateral trade rules.” China warned that it would “pay close attention to this investigation and take all proper measures to safeguard its legitimate right.”¹⁵⁸

¹⁵² Jethro Mullen, “China: The US Has started ‘the biggest trade war’ in history” (July 6, 2018), available at <https://money.cnn.com/2018/07/06/news/economy/us-china-trade-war-tariffs/index.html>.

¹⁵³ Information Office of the State Council of China, *The Fact and China’s Position on China-US Trade Friction* (September 2018) 22–23. According to the statistics of China, the number is only US\$275.8 billion. Furthermore, China has no intention to pursue a trade surplus against the U.S. The imbalance of trade in goods between two states is “more of a natural outcome of voluntary choices the US has made in economic structure and market in the light of its comparative strengths.” In particular, if taking into account all trade in goods, trade in services, and sales of local subsidiaries in the host country, trade and economic cooperation “delivers balanced benefits in general for China and the United States, with the latter reaping more net benefits.” *Id.*, at 18.

¹⁵⁴ “Trump targets China trade, says plans serious measures,” available at <https://www.reuters.com/article/us-usa-election-trump-china-idUSKCN10Z2JN> (last visited May 17, 2019).

¹⁵⁵ Presidential Memorandum for the United States Trade Representative, August 14, 2017. The memorandum states *inter alia* that “China has implemented laws, policies, and practices and has taken actions related to intellectual property, innovation, and technology that may encourage or require the transfer of American technology and intellectual property to enterprises in China or that may otherwise negatively affect American economic interests. These laws, policies, practices, and actions may inhibit United States exports, deprive United States citizens of fair remuneration for their innovations, divert American jobs to workers in China, contribute to our trade deficit with China, and otherwise undermine American manufacturing, services, and innovation.”

¹⁵⁶ *Id.*

¹⁵⁷ USTR, Initiation of Section 301 Investigation; Hearing; and Request for Public Committees; China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Federal Register, Vol. 82, No. 163, August 24, 2017.

¹⁵⁸ “MOFCOM Spokesman Comments on the 301 Investigation of the US against China” (August 21, 2018), available at <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201708/20170802631394.shtml>.

China's warning did not prevent the USTR from continuing the investigation. On March 22, 2018, the USTR released its findings,¹⁵⁹ according to which the Chinese government (1) uses foreign ownership restrictions to require or pressure technology transfer from U.S. companies to Chinese entities; (2) uses administrative review and licensing procedures to require or pressure technology transfer;¹⁶⁰ (3) directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by the Chinese government industrial plans;¹⁶¹ and (4) conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions, according to that finding, give the Chinese government unauthorized access to intellectual property, trade secrets, or confidential business information; they also support China's strategic development goals, including its science and technology advancement, military modernization, and economic development.¹⁶²

Based on the USTR finding, President Trump issued a memorandum announcing actions against China,¹⁶³ including the following: (1) Tariffs. The memorandum stated that the USTR should publish a proposed list of products for tariffs and any tariff increases and, after a period of notice and comment, will publish a final list of products and tariff increases; (2) WTO dispute settlement. The memo stated that the U.S. should seek a remedy before the WTO; and (3) Investment restrictions. The memo suggested that the U.S. should address concerns about investment in the U.S. directed or facilitated by China in industries or technologies deemed important to the U.S.¹⁶⁴ China once again expressed its strong opposition to these actions. The spokesperson, in commenting on that presidential memorandum, warned: "We do not hope to have a trade war with anyone, but we are never afraid of it."¹⁶⁵

The USTR released a proposed list of Chinese products for additional tariffs on April 3. According to that list, the U.S. will impose tariffs on approximately

¹⁵⁹ USTR, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974 (March 22, 2018).

¹⁶⁰ *Id.*, Part II and Part III.

¹⁶¹ *Id.*, Part IV.

¹⁶² *Id.*, Part V.

¹⁶³ Presidential Memorandum on the Actions by the United States Related to the Section 301 Investigation (March 22, 2018).

¹⁶⁴ *Id.*; "President Trump Announces Strong Actions to Address China's Unfair Trade," available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/president-trump-announces-strong#> (last visited May 17, 2019).

¹⁶⁵ Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on March 23, 2018, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1545062.shtml (last visited May 17, 2019).

US\$50 billion worth of Chinese imports.¹⁶⁶ China immediately fired back and announced on April 4 that it planned to impose an additional 25 percent tariff on approximately US\$50 billion worth of American imports, but that the final measures and the effective date of these measures would be decided later.¹⁶⁷ China's proposed countermeasures incensed President Trump. Trump thus instructed the USTR to consider the possibility of imposing additional tariffs on US\$100 billion worth of Chinese imports on April 5.¹⁶⁸

The risk of a trade war appeared to have been reduced after two rounds of tough negotiations held in Beijing and Washington in May. China and the U.S. issued a joint statement on May 19, in which they announced that they had reached a consensus in taking measures to substantially reduce the U.S. trade deficit with China.¹⁶⁹ In addition to a significant increase in purchasing U.S. goods and services, China promised law reforms aimed to enhance intellectual property protection. Furthermore, the two states agreed to encourage mutual investment and to endeavor to create a fair, level playing field for competition.

However, President Trump then surprised China by issuing a new statement just ten days later on May 29.¹⁷⁰ Based on the previously mentioned March 22 memorandum, Trump now claimed that: (1) the U.S. would implement specific investment restrictions and enhance export controls against Chinese persons and entities relating to the acquisition of industrially significant technology aiming at "protect our national security"; (2) the U.S. would continue to seek a remedy within the WTO to address China's discriminatory practices for licensing intellectual property; and (3) the U.S. would impose a 25 percent tariff on US\$50 billion worth of goods imported from China.

China criticized that Trump's decision run against the consensus reached in May.¹⁷¹ China reaffirmed their position that "we don't want a trade war, but will never quail or recoil from a trade war," and further pointed out that the U.S.'s "credibility and reputation" would be seriously damaged.¹⁷² China warned that,

¹⁶⁶ "Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products," available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/under-section-301-action-ustr> (last visited May 17, 2019).

¹⁶⁷ "China announces new tariffs on 106 US products, including soy, cars and chemicals," available at <https://www.cnbc.com/2018/04/04/china-new-us-tariffs-including-soy-cars-and-chemicals.html> (last visited May 17, 2019).

¹⁶⁸ Statement from President Donald J. Trump on Additional Proposed Section 301 Remedies (May 5, 2018).

¹⁶⁹ Joint Statement of the United States and China Regarding Trade Consultations, May 19, 2018.

¹⁷⁰ Donald J. Trump, Statement on Steps to Protect Domestic Technology and Intellectual Property from China's Discriminatory and Burdensome Trade Practices, May 29, 2018.

¹⁷¹ Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on May 30, 2018, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1563933.shtml (last visited May 17, 2019).

¹⁷² *Id.*

if the U.S. implemented tariffs and other restrictions, any agreements would be void, including the reported deal that China had offered to purchase nearly US\$70 billion worth of goods from the U.S. in return for the suspension of tariffs on Chinese products.¹⁷³

On June 15, the USTR released a list of products imported from China that would be subject to additional tariffs. The first set covers approximately US\$34 billion worth of goods and the additional 25 percent duty will be collected beginning July 6. The second set, which covers approximately US\$16 billion worth of goods, required further review in a public notice and comment process.¹⁷⁴ The U.S. began the collection of additional tariffs on Chinese imports on July 6. The USTR announced on August 7 that the second set of goods covering about US\$16 billion worth of Chinese imports would be subject to the additional 25 percent tariff beginning on August 23.

China's response was straightforward. On June 15, China announced that it would impose tariffs of the same size as those imposed by the U.S. and that the deal reached in May would be invalid as soon as the U.S. imposed additional tariffs on Chinese imports.¹⁷⁵ On June 16, China announced that it would impose an additional 25 percent tariff on US\$34 billion worth of U.S. goods starting on July 6 and that the additional tariffs on another US\$16 billion worth of U.S. goods would be subject to a later decision.¹⁷⁶ On July 6, China started the collection of additional tariffs on imports from the U.S.

President Trump was again very angry with this outcome. He issued a new statement on June 18, which directed the USTR to identify US\$200 billion worth of imports from China for additional tariffs at a rate of 10 percent, given that "China clearly indicate[d] its determination to keep the United States at a permanent and unfair disadvantage."¹⁷⁷ On August 1, President Trump announced that the rate would be increased to 25 percent. On August 3, China

¹⁷³ Ana Swanson, "China Offers to Buy Nearly \$70 Billion of American Goods if U.S. Halts Tariffs" (June 5, 2018), available at <https://www.nytimes.com/2018/06/05/us/politics/china-trump-trade-tariffs.html> (last visited May 17, 2019).

¹⁷⁴ "USTR Issues Tariff on Chinese Products in Response to Unfair Trade Practice," available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/ustr-issues-tariffs-chinese-products> (last visited May 17, 2019).

¹⁷⁵ "MOFCOM Spokesman Comments on the US Trade Measures against China," available at <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201806/20180602757671.shtml> (last visited May 17, 2019).

¹⁷⁶ "China announces retaliatory tariffs on \$34 billion worth of US goods, including agriculture products," available at <https://www.cnn.com/2018/06/15/china-announces-retaliatory-tariffs-on-34-billion-worth-of-us-goods-including-agriculture-products.html> (last visited May 17, 2019).

¹⁷⁷ Statement from the President Regarding Trade with China, June 18, 2018, available at <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-trade-china-2/> (last visited May 18, 2019).

replied by announcing that it would add 5 to 25 percent duties on US\$60 billion worth of U.S. goods.

On September 17, the U.S. finalized the list of US\$200 billion worth of Chinese imports that would be subjected to a 10 percent tariff beginning on September 24. That rate, according to Trump, would increase to 25 percent on January 1, 2019.¹⁷⁸ As a response, China announced that it would begin to impose 5 to 25 percent duties on US\$60 billion worth of U.S. goods also beginning on September 24.¹⁷⁹

4.2. How Is Lawfare Conducted?

4.2.1 Lawfare Concerning Community vs. Individual

4.2.1.1 *The SCS Arbitration*

Since the SCS arbitration was initiated by the Philippines against China, it clearly implicates the two countries involved, China and the Philippines. However, the SCS arbitration also raises some concerns for the whole international community because of the strategic significance that the SCS has for trade, transportation, and political and military power. Many countries, including the G-7 countries,¹⁸⁰ have therefore kept a close eye on the SCS arbitration, concerned with what the China-Philippines dispute will bring about to “the freedoms of navigation and overflight and other internationally lawful uses of the high seas and the exclusive economic zones as well as to the related rights and freedoms in other maritime zones” in the SCS.¹⁸¹ As early as 2009, then Secretary of State Hillary Rodham Clinton stated that the U.S. had “a national interest in the maintenance of peace and stability, respect for international law, freedom of navigation and unimpeded lawful commerce in the South China Sea.”¹⁸² For the part of China, after the SCS arbitration was launched, Chinese ambassadors to dozens of countries introduced China’s policy on SCS affairs and on the SCS arbitration by writing essays, giving speeches, and accepting

¹⁷⁸ Statement from the President, September 17, 2018, available at <https://www.whitehouse.gov/briefings-statements/statement-from-the-president-4/> (last visited May 17, 2019).

¹⁷⁹ “China hits back: It will impose tariffs on \$60 billion worth of US goods effective Sept. 24,” available at <https://www.cnbc.com/2018/09/18/china-says-new-tariffs-on-us-goods-worth-60-billion-effective-sept-24.html> (last visited May 17, 2019).

¹⁸⁰ G7 Foreign Ministers’ Declaration on Maritime Security Lübeck, April 15, 2015; Leaders’ Declaration, G7 Summit, June 7–8, 2015.

¹⁸¹ G7 Foreign Ministers’ Statement on Maritime Security (2016).

¹⁸² See Hillary Rodham Clinton, Remarks at the ASEAN Ministerial Meeting, New York (September 27, 2012), available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2012/09/198343.htm>.

interviews,¹⁸³ which has never happened in the history of the PRC. This shows that China finds it urgent to clarify and defend its SCS policy to the international community.

From the very beginning, the Philippines sought to convince the world that the SCS arbitration was not only a “bilateral” dispute between China and the Philippines but also a “multilateral” dispute between China and the international community. According to the Philippines, China’s SCS policies and practices deny not only the rights of the Philippines but also those of other countries in the SCS. Therefore, according to the Philippines, those nondisputing parties in the SCS arbitration have a “community” concern in the arbitration.

In order to “multilateralize” the SCS dispute, the Philippines accused China of, among other allegations, unlawfully interfering with the fishing activities of Philippine fishermen.¹⁸⁴ The Philippines also argued that China’s claim to historic rights in the SCS ran “contrary to” the UNCLOS.¹⁸⁵ Particularly, in the statement submitted before the SCS Tribunal on July 7, 2015, Rosario, then the secretary of foreign affairs of the Philippines, emphatically stated that the Philippines did not ask the tribunal to decide questions of territorial sovereignty with China. He instead argued that the SCS arbitration involved the “interpretation and application” of the UNCLOS.¹⁸⁶ The rationale underlying this argument was to prevent the China-Philippines dispute from being identified as merely between individual states. Instead, Rosario stressed that the maritime law the Philippines sought to clarify was important “to all coastal States that border the South China Sea, and even to all the States Parties to UNCLOS.”¹⁸⁷ All in all, Rosario argued that the SCS arbitration

is of utmost importance to the Philippines, to the region, and to the world. In our view, it is also of utmost significance to the integrity of the Convention,

¹⁸³ See, e.g., Liu Xiaoming, “South China Sea Arbitration Is a Political Farce,” available at <https://www.telegraph.co.uk/news/2016/07/23/south-china-sea-arbitration-is-a-political-farce/> (last visited May 17, 2019).

¹⁸⁴ Final Award of the SCS, para. 112.

¹⁸⁵ *Id.* According to the Chinese government and commentators, Chinese historic rights “do not derive from the UNCLOS,” but “are rooted deeply in history and culture, acquired under customary international law and based on consistent state practice.” It is thus “legally incorrect and politically unfeasible” to deny and deprive of China’s historic rights in the SCS. Zhiguo Gao and Bing Bing Jia, at 121, 124. Partly because an explicit clarification of the meaning of historic rights might provoke other countries, China remains ambiguous on this matter.

¹⁸⁶ Albert F. Del Rosario, “Why the Philippines Brought This Case to Arbitration and Its Importance to the Region and the World(hereinafter “Statement of Foreign Minister Rosario (2015)”),” available at <https://www.rappler.com/nation/98769-philippines-china-hague-opening-statement-full-text> (last visited May 17, 2019).

¹⁸⁷ *Id.*

and to the very fabric of the “legal order” for the seas and oceans that the international community so painstakingly crafted over many years.¹⁸⁸

China appears to be aware of the legal strategy employed by the Philippines. Therefore for its part, China insisted that the dispute with the Philippines was “bilateral” and thus sought to pierce the “veil” of community of the SCS arbitration. In other words, China always sought to bilateralize the SCS dispute with the Philippines. China repeatedly argued that the “essence” of the SCS arbitration subject matter was the “territorial sovereignty over several maritime features” in the SCS and did not concern the interpretation or application of the UNCLOS.¹⁸⁹ China then urged other countries to “stay neutral and objective” instead of “taking sides” on issues relating to territorial sovereignty and maritime rights and interests in the SCS.¹⁹⁰

On the other hand, China acknowledged certain community concerns in the SCS and thus sought to assure other countries that it would always respect the relevant rights of other states in the SCS. For instance, Article 11 of the Law on Exclusive Economic Zone and the Continental Shelf (1998)¹⁹¹ provides that, subject to international law and China’s national law, all states shall “enjoy the freedom of navigation in and flight over its exclusive economic zone, the freedom to lay submarine cables and pipelines and the convenience of other lawful uses of the sea related to the freedom mentioned above.”¹⁹² In the Statement of China on Negotiations on the Settlement of the SCS disputes (2016), China reaffirmed its policy on this matter. The Statement pointed out:

136. *China is committed to upholding the freedom of navigation and overflight enjoyed by all states under international law, and ensuring the safety of sea lanes of communication.*

137. The South China Sea is home to a number of important sea lanes, which are among the main navigation routes for China’s foreign trade and energy import. Ensuring freedom of navigation and overflight and safety of sea lanes in the South China Sea is crucial to China. Over the years, China has worked with ASEAN Member States to ensure unimpeded access to and safety

¹⁸⁸ *Id.*

¹⁸⁹ Position Paper on the SCS Arbitration Jurisdiction (2014), para. 3.

¹⁹⁰ Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on May 17, 2016, available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1364128.shtml (last visited May 17, 2019).

¹⁹¹ Law on the People’s Republic of China Exclusive Economic Zone and the Continental Shelf, adopted and took into effect on June 26, 1998, art. 14. *See also* Statement of China’s Rights in the SCS (2016).

¹⁹² *See also* Statement of China on Negotiations on the Settlement of the SCS disputes (2016), para. 139.

of the sea lanes in the South China Sea and made important contribution to this collective endeavor. *The freedom of navigation and overflight enjoyed by all states in the South China Sea under international law has never been a problem* (emphasis added).

Furthermore, China promised more efforts to facilitate community interests in the SCS. The Statement continued to provide that

138. China has actively provided international public goods and made every effort to provide services, such as navigation and navigational aids, search and rescue, as well as sea conditions and meteorological forecast, through capacity building in various areas, so as to uphold and promote the safety of sea lanes in the South China Sea.

In summary, China acknowledged that there was community interest in the SCS, but disputed that the Philippines initiated the SCS arbitration to defend this community interest. China's counter-lawfare appears to have been somewhat helpful. It was reported that dozens of states have supported China's position on the SCS arbitration while few countries, namely, Japan, Australia, and the U.S., explicitly expressed their reservation or opposition.¹⁹³

4.2.1.2 China-U.S. Trade War

Debate concerning the roles of the community versus individual in the China-U.S. trade war is generally conducted under the framework of multilateralism versus unilateralism. In contrast with the SCS arbitration in which China risks being defamed as an aggressive great power that seeks to deny community interest, the China-U.S. trade war offers China an opportunity to assert that the U.S., by taking unilateral action, challenges the multilateralism pursued by the international community through the WTO. In other words, American unilateral actions not only infringe the trade rights of China under WTO agreements but also place the multilateral trade system in peril. Therefore, China argues, the China-U.S. trade war involves not only disputes directly between the U.S. and China but also disputes indirectly between the U.S. and other WTO Members.

According to China, the most dangerous American unilateral actions were blocking selection of new members of the WTO Appellate Body, the initiation of Section 232 investigations on steel and aluminum products imported from many countries including China, and the Section 301 investigation of

¹⁹³ Wang Wen and Chen Xiaochen, "Who Supports China in the South China Sea and Why" (July 27, 2016), available at <https://thediplomat.com/2016/07/who-supports-china-in-the-south-china-sea-and-why/> (last visited May 18, 2019).

China. Zhang Xiangchen, China's ambassador to the WTO, described these challenges as "three hard blows" to the WTO. According to Zhang, any of the three challenges "if left untreated, will fatally undermine the functioning of the WTO."¹⁹⁴ Zhang warned that the "three hard blows" bring an "unprecedented challenge" to the WTO not seen in the twenty-three years following the establishment of the WTO in 1995.¹⁹⁵

In contrast with the other two "blows," the Section 301 investigation is only targeted against China and appears to be a dispute only between China and the U.S. Therefore, it is crucial for China to succeed in convincing other WTO Members that China-U.S. trade not only impacts relations between the two countries but also poses an "unprecedented challenge" by the U.S. to the multilateral trade system. Zhang Xiangchen stated that the Section 301 investigation "will not only impair the rights and interests of China and other WTO Members, but also seriously undermine the multilateral trading system."¹⁹⁶ He further argued:

Anybody at any time can be its target, and nobody, especially the small and medium economies, can defend themselves on their own. The unilateral tendency of the US's trade policy shall be of serious concern of all Members and shall be firmly rejected. To do so is not just our responsibility, but also the only right way to cope with it. . . . China is expecting all members to join hands together and to collectively safeguard the rules-based multilateral trading system. . . .¹⁹⁷

After the U.S. imposed a 25 percent tariff on US\$34 billion worth of Chinese goods on July 6 and threatened more tariffs and nontariff measures, China explicitly described the U.S. as an "outlaw" state. In a statement of the MOC of China issued on July 13, China announced that the U.S. was "not only launching a trade war with China, but also with the whole world."¹⁹⁸ The Statement, among others, states:

When the United States willfully exits from groups based on its own interests under the pretext of "American First", *it becomes an enemy to all*. . . . It is fair

¹⁹⁴ Statement of Ambassador Zhang Xiangchen of May 8, 2018.

¹⁹⁵ *Id.*

¹⁹⁶ Statement by Ambassador Zhang Xiangchen on the US Section 301 at the Meeting of the WTO's Council on Trade in Goods (March 26, 2018), available at <http://wto2.mofcom.gov.cn/article/chinaviewpoints/201803/20180302724031.shtml>.

¹⁹⁷ Statement of Ambassador Zhang Xiangchen of May 8, 2018.

¹⁹⁸ China's MOC Issues Statement on US Section 301 investigation (July 13, 2018) (hereinafter ("China's MOC Statement of July 13, 2018")), available at <http://usa.chinadaily.com.cn/a/201807/13/WS5b4788bba310796df4df624b.html>.

to say that *this largest trade war in the economic history launched by the United States is not a trade war between the United States and China, but a global trade war*. Such US practices will drag the world economy into the “cold war trap”, “recession trap”, “anti-contract trap” and “the trap of uncertainty”, seriously worsen global economic and trade environment, destroy global industrial chain and value chain, hinder global economy recovery, trigger global market fluctuations and hurt the interests of numerous multinationals and average customers in the world. (Emphasis added.)¹⁹⁹

The U.S. proposed a unique conception of unilateralism and multilateralism to rebut China’s accusation. According to Dennis Shea, American ambassador to the WTO, the unilateral actions taken by the U.S. attempt to respond to the practices that “benefit China at the expense of its trading partners” and which should have been effectively addressed by the WTO.²⁰⁰ Shea accused China of, among other things, using foreign ownership restrictions to cause “economic harm worth tens of billions of dollars annually to the United States, and multiples of that to WTO Members collectively.”²⁰¹ He also argued that China’s understanding that “the mere existence of the WTO prevents any action by any Member to address its unfair, trade-distorting practices and policies—unless those policies are currently subject to WTO dispute settlement” is unsound.²⁰² He concluded by stating that “[t]he truth is, it is China that is the unilateralist, consistently acting in ways that undermine the global system of open and fair trade.”²⁰³ He then warned that the WTO “must avoid falling down this rabbit hole into a fantasy world, lest it lose all credibility.”²⁰⁴

Following its report on China’s WTO compliance²⁰⁵ and the Section 301 investigation, the U.S. opened a new battlefield in the WTO to frame how China practices “unilateralism.” In a provoking communication submitted to the General Council of the WTO on July 11, the U.S. shifted its fire from targeting China’s specific controversial measures to critiquing China’s whole economic

¹⁹⁹ *Id.*

²⁰⁰ Ambassador Dennis Shea’s Statement at the WTO General Council (May 8 2018) (hereinafter “Statement of Ambassador Dennis Shea of May 8, 2018”), available at <https://geneva.usmission.gov/2018/05/16/ambassador-dennis-sheas-statement-at-the-wto-general-council/>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* Shea said that “we have now entered the realm of Alice in Wonderland. White is black. Up is down. It is amazing to watch a country that is the world’s most protectionist, mercantilist economy position itself as the self-proclaimed defender of free trade and the global trading system.” *Id.*

²⁰⁴ *Id.* Shea also stressed that “[i]f the WTO is seen as a shield protecting those Members that choose to adopt policies that can be shown to undermine the fairness and balance of the international trading system, then the WTO and the international trading system will lose all credibility and support among our citizens.” *Id.*

²⁰⁵ USTR, 2017 Report to Congress on China’s WTO Compliance (January 2018).

model, namely, the “state-led, trade-disruptive economic model.”²⁰⁶ According to the U.S., in order to develop a “socialist market economy,” China’s government and the CCP “direct and channel economic actors to meet government planning” and permit market forces to operate only “to the extent that such activity accords with the objectives of national economic and industry policy,” which runs against the “open, market-oriented policies” underlying the multilateral trade system.²⁰⁷ According to the U.S., such an economic model has dramatically expanded China’s trade power and economy at the expense of other WTO Members.²⁰⁸

China opposes the American conception of unilateralism and multilateralism. China defines unilateralism in terms of international treaties that are legally binding on WTO Members, including the U.S. ambassador. Zhang replied to U.S. statements on the issue by stating:

It doesn’t mean that any measure by a single member can be labeled as “unilateral”. Every country has its own economic policies. There is a line between legitimate policy space and unilateral action. The line is the multilateral rules we all agreed upon. *If it’s consistent with the WTO rules, the policy is legitimate, otherwise it would be unilateral* (emphasis added).²⁰⁹

In Ambassador Zhang’s opinion, some WTO Members, including the U.S., have some concerns about “new” rules, which “need to be negotiated and adopted through consensus, not unilaterally imposed by a single member.”²¹⁰

Lawfare concerning multilateralism versus unilateralism has spurred a wave of WTO litigations.

As a response to the Section 232 investigations, China filed a request for consultation with the U.S. concerning the 25 percent and 10 percent additional tariffs on certain steel products and aluminum products, respectively, from China on April 9. China alleged that the questioned measures were inconsistent with a number of provisions of GATT 1944 and the Agreement on Safeguards.²¹¹ Many WTO Members followed China’s lead, including India,²¹²

²⁰⁶ China’s Trade—Disruptive Economic Model—Request from the United States, WT/GC/W/745, July 16, 2018.

²⁰⁷ *Id.*, at 2.

²⁰⁸ *Id.*, at 6–8.

²⁰⁹ Statement of Ambassador Zhang Xiangchen of May 8, 2018.

²¹⁰ *Id.*

²¹¹ United States—Certain Measures on Steel and Aluminum Products, WT/DS544/1, April 9, 2018.

²¹² United States—Certain Measures on Steel and Aluminum Products, Request for Consultations by India, WT/DS547/1 G/L/1238 G/SG/D53/1, May 23, 2018.

the EU,²¹³ Canada,²¹⁴ Mexico,²¹⁵ Norway,²¹⁶ Russia,²¹⁷ Switzerland,²¹⁸ and Turkey.²¹⁹ All these members agree that the U.S. disrupted the multilateral trade discipline by initiating the unilateral Section 232 investigation. It should be noted that each of these WTO litigations has attracted many other WTO Members that have become involved as third parties. For instance, after the EU requested consultation with the U.S., other countries, including Japan, China, Thailand, Turkey, Canada, Hong Kong (China), India, Mexico, Norway, Russia, and Indonesia, successively requested to join the consultations. China also requested to join all of these WTO litigations as a third party. The U.S. thus risks being identified as an “outlaw” country in the international trade community.

However, there is a somewhat different story with respect to the Section 301 investigation against China. The U.S. first filed before the DSB a request for consultations with China to address China’s discriminatory technology licensing requirements on March 23.²²⁰ Japan, the EU, Ukraine, Saudi Arabia, and Chinese Taipei have requested to join the consultations. In response, China sent a communication to the WTO on April 4, requesting consultation with the U.S. concerning the proposed tariff measures that the U.S. would take, under Section 301 of the Trade Act of 1974, on certain goods imported from China.²²¹ After the U.S. began to collect additional tariffs on Chinese imports on July 6, China, based on the request for consultation of April 4, filed an addendum to the request for consultation.²²² China added a second addendum to the request for consultation on July 17, after the U.S. published a new list of Chinese products subject to additional tariffs on July 10.²²³ China initiated new requests for

²¹³ United States—Certain Measures on Steel and Aluminium Products—Request for Consultations by the European Union, WT/DS548/1, June 6, 2018.

²¹⁴ United States—Certain Measures on Steel and Aluminum Products, Request for Consultations by Canada, WT/DS550/1 G/L/1245 G/SG/D55/1, June 6, 2018.

²¹⁵ United States—Certain Measures on Steel and Aluminum Products, Request for Consultations by Mexico, WT/DS551/1 G/L/1246 G/SG/D56/1, June 7, 2018.

²¹⁶ United States—Certain Measures on Steel and Aluminium Products—Request for Consultations by Norway, WT/DS552/1, June 19, 2018.

²¹⁷ United States—Certain Measures on Steel and Aluminium Products—Request for Consultations by the Russian Federation, WT/DS554/1, July 2, 2018.

²¹⁸ United States—Certain Measures on Steel and Aluminium Products—Request for Consultations by Switzerland, WT/DS556/1, July 12, 2018.

²¹⁹ United States—Certain Measures on Steel and Aluminium Products—Request for Consultation by Turkey, WT/DS564, August 15, 2018.

²²⁰ China—Certain Measures Concerning the Protection of Intellectual Property Rights, WT/DS542/1, March 26, 2018. The U.S. accused that the relevant law and practice of China *inter alia* is inconsistent with Article 3 and Article 28.2 of the TRIPS Agreement.

²²¹ United States—Tariff Measures on Certain Goods from China, WT/DS543/1, April 5, 2018. China argued that the Section 301 investigation and actions are inconsistent with Article I.1 of the GATT 1994 and Article 23 of the DSU.

²²² United States—Tariff Measures on Certain Goods from China, WT/DS543/1/Add.1, April 5, 2018.

²²³ United States—Tariff Measures on Certain Goods from China, WT/DS543/1/Add.2, July 17, 2018.

consultation on August 27 and September 23, after the U.S. declared new tariff measure on US\$200 billion worth of Chinese imports.²²⁴ Interestingly, none of other WTO Members applied to intervene as third parties in the Section 301 case initiated by China. In contrast, in the Section 301 case that the EU initiated against the U.S. in 1998,²²⁵ sixteen WTO Members²²⁶ intervened as third parties. In this sense, it seems that China has failed to attract other WTO Members to its litigation against the U.S., which may impose less pressure on the U.S.

In the context of the WTO, multilateralism or unilateralism should concern whether or not the legal obligations provided for in WTO agreements are complied with. As far as the Section 301 investigation is concerned, people should bear in mind that about twenty years ago the DSB implied that Section 301 investigations were not consistent with GATT 1994.²²⁷ Despite this, China might be surprised to find that the unique American conception of unilateralism and multilateralism appears to have some support from other WTO Members. As noted, none of the WTO Members applied as third parties in the Section 301 case initiated by China against the U.S. before the DSB, which might at least suggest that other WTO Members do not think that they have a substantial interest in that case. More importantly, the U.S. appears to have to some degree succeeded in convincing the world that the multilateralism which China loudly argues for is flawed and thus needs improvement. This trend endows American unilateralism with some legitimacy. On May 3, the U.S., together with the EU and Japan, issued a statement²²⁸ which includes three annexes concerning industrial subsidies, technology transfer policies, and “market oriented conditions.”²²⁹ Two months later, the EU Commission put forward its proposals to modernize the WTO by, among other things, negotiating new WTO rules.²³⁰ These proposals call for more rigid discipline for illegal subsidies, SOEs, and forced technology transfer,²³¹ which are the very things that the U.S. sought by initiating a Section 301 investigation against China. Importantly, although

²²⁴ United States—Tariff Measures on Certain Goods from China, WT/DS565/1, August 27, 2018; WT/DS565/2, September 3, 2018.

²²⁵ United States—Sections 301–310 of the Trade Act of 1974—Request for Consultations by the European Communities, WT/DS152/1, November 30, 1998;

²²⁶ They are Brazil, Canada, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, Hong Kong (China), India, Israel, Jamaica, Japan, Korea, St. Lucia, and Thailand.

²²⁷ United States—Section 301–310 of the Trade Act of the 1974, Report of the Panel, WT/DS152/R, December 22, 1999, at 350.

²²⁸ Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union (May 3, 2018), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting>.

²²⁹ *Id.*

²³⁰ EU Commission, WTO-EU’s Proposals on WTO Modernization, Brussels, July 5, 2018.

²³¹ *Id.*

it opposed the Section 301 investigation, China acknowledges that “new rules might need to be developed to address new challenges.”²³²

In summary, China seeks to convince the world that the China-U.S. trade war not only involves disputes between two WTO Members but also implicates the battle between unilateralism and multilateralism. By arguing that the U.S. is a unilateralist, while China is a guardian of multilateralism, China attempts to identify the U.S. as an individual WTO Member that defies the international trade community. However, the U.S., by highlighting the defects of current WTO discipline and proposing a new vision of multilateralism, seeks to not only weaken China’s accusation that the U.S. defied multilateralism but also proclaim that the U.S. is an advocate of a better multilateralism.

4.2.2 Lawfare Concerning Politics vs. Law

4.2.2.1 *The SCS Arbitration*

The Philippines has repeatedly contended that, by bringing its “legal dispute” with China before the SCS Tribunal, it is merely calling for “interpretation and application” of the UNCLOS, and, more specifically, a clarification of the maritime entitlements that the Philippines enjoys.²³³ Foreign Minister Rosario emphasized that dispute resolutions provisions of the UNCLOS would “allow the weak to challenge the powerful on an equal footing, confident in the conviction that principles trump power; that law triumphs over force; and that right prevails over might.”²³⁴ If China can disregard the regulations included in the UNCLOS on maritime entitlements, Rosario said, “what value is there in the Convention for small States Parties as regards their bigger, more powerful and better armed neighbors?”²³⁵ Implied in Rosario’s statement is that China takes advantage of its overwhelming political power to deny the legal rights of the Philippines under the UNCLOS. In particular, Rosario stated that the initiation of SCS arbitration by the Philippines could enhance the “rule of law in international relations” and, more specifically, “legal order for the seas and oceans.”²³⁶

As for China, in addition to stating that the Philippines has no right to initiate the SCS arbitration, China stressed that the SCS arbitration was politically manipulated, which makes it neither lawful nor legitimate. For instance, at a briefing immediately after the SCS Tribunal rendered the final award, Liu Zhenmin, vice foreign minister of China, asserted:

[T]his arbitral tribunal’s composition is actually the result of a political manipulation. The particular tribunal panel consists of five arbitrators. Except

²³² Statement of Ambassador Zhang Xiangchen of May 8, 2018.

²³³ Statement of Foreign Minister Rosario (2015).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

for Judge Rüdiger Wolfrum who was appointed by the Philippines, the other four were appointed by the then president of the International Tribunal for the Law of the Sea Shunji Yanai. And who is Shunji Yanai? He is a judge of the International Tribunal for the Law of the Sea, the former Japanese ambassador to the United States and also the one to help Japanese Prime Minister Shinzo Abe lift the ban on collective self-defense, challenging the international order formed after World War II. According to various sources, the composition of the tribunal was totally manipulated by him, who later continued exerting his influence during the arbitral tribunal's proceedings.²³⁷

China's complain is not totally unsound in light of the fact that in the past decade bilateral relations between China and Japan have worsened and, in particular Japan and the U.S., have sought to strategically contain a rising China. Indeed, some Japanese observers have agreed that Japan was involved indirectly in the SCS arbitration. For instance, Jiro Honzawa suggested that the SCS arbitration was "not about truth but about politics" and that the Philippines "was abetted by the U.S. and Japan to apply for arbitration, because the latter two want to contain China."²³⁸ Similarly, Motofumi Asai contended that the SCS arbitration "was obviously conducted in accordance with the wills of the Abe administration."²³⁹ As far as international judges are concerned, it seems that international judges are not always impartial as required. Schachter observed that "in view of record," it is difficult to deny that international judges are influenced by the views of their own governments.²⁴⁰ Yanai was believed a key figure in prompting Japan to lift the ban on Japan dispatching its military overseas, which was prohibited by the Japanese "Peaceful Constitution" after World War II. China thus believes that Yanai's prior public service in the Abe administration and his political background damages his credibility exercising his appointment powers.

4.2.2.2 *China-U.S. Trade War*

The political dimension of the China-U.S. trade war first concerns national security, which, according to the U.S., justifies the Section 232 investigation. It has been widely recognized that those actions based upon national security

²³⁷ Veil of the Arbitral Tribunal Must Be Tore Down—Vice Foreign Minister Liu Zhenmin Answers Journalists' Questions on the So-called Binding Force of the Award Rendered by the Arbitral Tribunal of the South China Sea Arbitration Case (July 13, 2016), available at http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1381879.shtml.

²³⁸ *Id.*

²³⁹ "News Analysis: Shunji Yanai, manipulator behind illegal South China Sea arbitration" (July 17, 2016), available at http://www.xinhuanet.com/english/2016-07/17/c_135519215.htm.

²⁴⁰ Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) 43.

considerations are “self-judging” and should be given great respect. This approach has long been maintained in WTO dispute settlements.²⁴¹

On March 8, President Trump, in accordance with Section 232 of the Trade Expansion Act of 1962, decided to impose a 25 percent and 10 percent ad valorem tariff on steel articles and aluminum articles, respectively, from all countries.²⁴² In defending the Section 232 investigations and the following tariff measures, the U.S. explained that each WTO Member in accordance with Article 21 of the GATT 1994 retains the authority to determine those matters that it considers necessary to the protection of its essential security interests and that national security issues are “political matters” which are not subject to review by WTO.²⁴³

The U.S. claimed that steel and aluminum are important to national security because they are required for national defense and critical infrastructure. However, it also described in detail how the increase of steel and aluminum adversely affects the “economic welfare” of the U.S., for instance, through loss of employment.²⁴⁴ Furthermore, the U.S. promised that those countries with an “important security relationship” with the U.S., such as Canada and Mexico, could seek a waiver of the tariff measures or reach mutually satisfactory alternatives with the U.S.²⁴⁵ Canada strongly rejected such a “privilege,” and considered it “literally absurd” because nobody should believe that importing steel from Canada can constitute a national security threat to the U.S.²⁴⁶

The WTO Members that are the targets of U.S. tariffs agree that Section 232 investigations fall within the national security exception provided in Article 21 of the GATT 1994. Indeed the targeted countries, including China, invoked the Agreement on Safeguards instead of the GATT 1994 to request consultations with the U.S. concerning its tariffs on steel and aluminum. These uniform

²⁴¹ See Steven Croley, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *Am. J. Int'l L.* 193 (1996).

²⁴² Presidential Proclamation on Adjusting Imports of Aluminum into the United States (March 8, 2018), available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/>; Presidential Proclamation on Adjusting Imports of Steel into the United States (March 22, 2018), available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states-2/>.

²⁴³ See, e.g., United States—Certain Measures on Steel and Aluminum Products, Communication from the United States, WT/DS550/10, July 6, 2018.

²⁴⁴ U.S. Department of Commerce Bureau of Industry and Security Office of Technology Evaluation, *The Effect of Imports of Steel on the National Security* (Section 232 Investigation on Steel Imports), January 11, 2018; U.S. Department of Commerce Bureau of Industry and Security Office of Technology Evaluation (Section 232 Investigation on Aluminum Imports), *The Effect of Imports of Aluminum on the National Security*, January 17, 2018.

²⁴⁵ *Id.*

²⁴⁶ David Reid, “‘Absurd’ for US to consider Canada a security risk over steel, defense minister says” (June 1, 2018), available at <https://www.cnn.com/2018/06/01/absurd-for-us-to-consider-canada-a-security-risk-over-steel-defense-minister-says.html>.

responses show that the targeted countries regard the disputes resulting from questioned tariff measures as purely legal disputes arising from economic calculation and not as national security concerns. In other words, they believe that the U.S. seeks to politicize the legal disputes.

On the other hand, although the Section 301 investigation against China was not initiated in accordance with American laws concerning national security, China argues that the investigation is strongly motivated by political considerations. China stated that “[f]or the purpose of meeting its political need at home and containing China, the US side produced a whole set of policy logics that distorted the truth of China-US economic and trade relations.”²⁴⁷ This argument is not without support. In the National Security Strategy of 2017, the U.S. has explicitly identified China as a “revisionist power,” which, together with Russia, wants to “challenge American power, influence, and interests, attempting to erode American security and prosperity,” including seeking to displace U.S. in the India-Pacific area.²⁴⁸ Chinese economic policies and practices, from trade to investment and intellectual property, are indeed viewed by America as issues of national security.²⁴⁹ According to China, the Section 301 investigation was a part of the new national security strategy of the U.S. toward China.

4.2.3 Lawfare Concerning Good Faith vs. Bad Faith

4.2.3.1 *The SCS Arbitration*

Article 300 of the UNCLOS provides that “State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner would not constitute an abuse of right.”²⁵⁰

In the beginning of their dispute, China accused the Philippines of abusing its rights under the UNCLOS by initiating the SCS arbitration. First, China alleged that the “essence” of the subject matter of the SCS arbitration concerns the territorial sovereignty over several maritime features. According to China, the Philippines “is well aware” that the tribunal established under Article 287 of the UNCLOS has no jurisdiction over territorial sovereignty disputes. China alleged that the Philippines “cunningly packaged its case” with the aim of “circumvent[ing] this jurisdictional hurdle and [fabricating] a basis” for initiating the arbitral proceeding.²⁵¹ China thus argues that the SCS Tribunal

²⁴⁷ China’s MOC Statement of July 13, 2018.

²⁴⁸ White House, National Security Strategy of the United States, December 2017, at 2, 25.

²⁴⁹ *Id.*, at 21, 46, 48, 51.

²⁵⁰ The UNCLOS, art. 300.

²⁵¹ Position Paper on the SCS Jurisdiction (2014), para. 14.

has no jurisdiction to determine the extent to which China may claim maritime rights under the UNCLOS “without first having determined China’s territorial sovereignty over the maritime features” in the SCS, which is clearly beyond its jurisdiction.²⁵² Second, China argued that the Philippines failed to honor its obligation to negotiate with China to resolve disputes. Article 280 (1) of the UNCLOS states that, if disputing parties have agreed to settle a dispute by any means “of their own choice,” the dispute settlement proceeding under the UNCLOS can only apply “where no settlement has been reached” by such means. According to China, the two countries, through a series of bilateral and multilateral instruments, have agreed to settle disputes through negotiations and such negotiations have not yet officially commenced.²⁵³

4.2.3.2 *China-U.S. Trade War*

In *United States—Section 301–310 case of 1999*, the DSB Panel decided that those aspects of Sections 301–310 of the U.S. Trade Act were “not inconsistent with” U.S. obligations under the WTO. The panel further stressed that its conclusions “[were] based in full or in part on” the undertaking the U.S. made in the Statement of Administrative Action (SAA) of 1994.²⁵⁴ The panel thus warned that “should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer [be] warranted.”²⁵⁵ According to China, although the 1994 SAA “saved the US law from being ruled as a violation of the WTO rules,”²⁵⁶ the finding that the panel made concerning Section 301 is “*prima facie* incompatible with the multilateral trading system.”²⁵⁷ Therefore, China argues that the U.S. acted in bad faith by initiating the Section 301 investigation against China.

Furthermore, as noted previously, after President Trump issued his statement on May 29, which China considered in violation of the relevant consensus that the two countries had reached on May 19, China warned that the U.S. damaged its own “credibility and reputation.”²⁵⁸ In other words, China contends that the U.S. is still failing to act in good faith.

The U.S. obviously has a different interpretation of the 1999 finding of the DSB and the 1994 SAA. According to the U.S., the 1994 SAA on one hand provides that, given that the dispute settlement mechanism in the WTO is

²⁵² *Id.*, para. 13.

²⁵³ *Id.*, para.48.

²⁵⁴ *United States—Section 301–310 of the Trade Act of 1974*, WT/DS152/R, December 22, 1999, Report of the Panel, at 350; Statement for Administrative Action (SAA (1994)), H.R. Doc. No. 103-316, 103d Cong., 2d Sess. 656–896 (1994).

²⁵⁵ Report of the Panel, at 351.

²⁵⁶ Statement of Ambassador Zhang Xiangchen of May 8, 2018.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

substantially better than that in the GATT, the USTR, in accordance with that SAA, may invoke the dispute settlement procedures of the DSU;²⁵⁹ on the other hand, it also provides that neither Section 301 nor the DSU requires the USTR to invoke DSU procedures if the USTR “does not consider that a matter involves a Uruguay Round agreement.”²⁶⁰ Thus, the USTR argued that Section 301

will remain fully available to address unfair practices that do not violate U.S. rights or deny U.S. benefits under the Uruguay Round agreements and, as in the past, such investigations will not involve recourse to multilateral dispute settlement procedures.²⁶¹

The U.S., therefore, argues that it is not abusing its rights but rather is acting in good faith, because it filed before the WTO the request for consultation with China concerning Chinese intellectual property measures, which fall within the jurisdiction of the DSB.²⁶² Furthermore, the U.S. argues, since the other allegedly unfair practices fall outside the WTO’s scope, it has no obligation to bring them before the DSB. The USTR, in his comment on the Chinese retaliatory measures which took effect on July 6, accordingly argued that China retaliated “without any international legal basis or justification.”²⁶³

5. Concluding Remarks

Over the past two decades, international law has become a factor that states have to take more seriously in the settlement of international disputes, even though this trend does not necessarily mean that an international dispute will be eventually resolved in strict accordance with international law. There are two major factors contributing to this trend. First, international law has steadily expanded in both scope and content. International relations are thus much more governed by legal regulation. Second, the number of international courts with compulsory jurisdiction have significantly increased, which enhances the judicialization of international law. By rendering binding decisions and conducting their proceedings in a transparent way, international

²⁵⁹ SAA (1994), *id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² China—Certain Measures Concerning the Protection of Intellectual Property Rights—Request for Consultations by the United States, WT/DS542/1, March 26, 2018.

²⁶³ Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-us-trade-representative> (last visited May 17, 2019).

courts enhance the effectiveness and legitimacy of the process of international dispute settlement. However, in a world where the boundaries between power and justice, and politics and law have not been properly defined, international law is susceptible to be either defied, misused, or abused when settling international disputes, thereby damaging the effectiveness and legitimacy of international law. Therefore, a critical appraisal on the role of international law in international dispute settlement needs a perspective of lawfare and an analytical framework for lawfare building on three dimensions of community versus individual, politics versus law, and good faith versus bad faith.

Traditionally, China has preferred to settle international disputes through negotiation instead of international adjudication. Since the 1990s, however, China has begun to accept international regimes, which include dispute settlement mechanisms with compulsory jurisdiction, such as the UNCLOS and WTO agreements. As a result, China has been more involved in international adjudication whether it favors it or not. Today, China, either as complainant or as a defendant, has become confident in using the WTO dispute settlement mechanism. China was hauled before the SCS Tribunal, even though China neither “accepts” nor “participates in” the SCS arbitration, and has said it will not enforce the award rendered by the SCS Tribunal. Moreover, we can see that China participates in international proceedings in a more flexible way. For instance, China appears before the DSB as a third party before the ICJ or the ITLOS by submitting statements and/or presenting oral statements in some advisory cases.

Traditionally, cultural and ideological factors have been highlighted to explain China’s policies and practices on international dispute settlement. This strategy often suggests that there is a litigation-unfriendly tradition in Confucianism and that its socialist ideology contributes to China’s distrust of international adjudication. These explanations appear neither sufficient nor effective as China has become more and more involved in the international legal order and, in particular, as China continues to rise as a leading world power. For instance, it seems that the allegedly litigation-unfriendly tradition has not had an important influence on China’s legal strategy for dealing with WTO disputes. Close examination of recent changes and their clash with past theories requires an exploration of new explanations. For instance, China might be more willing to accept international adjudication as Chinese legal personnel improve their legal knowledge and skills. It might be more important that, as China rises as a leading power, state power is becoming a new factor that influences how China deals with international dispute settlements.

The China-Philippines SCS arbitration and the China-U.S. trade war are two crises that China and even the whole international community face in the new world of a rising China and the judicialization of international law. These two

crises provide people with a picture presenting how the Philippines, a less powerful state, wages lawfare to challenge China, while the U.S., a more powerful state launches a trade war against China, a rising power. These crises also illustrate how China conducts counter-lawfare against the Philippines and how China wages lawfare against the U.S. Both the lawfare and counter-lawfare that China conducts demonstrate how China understands and uses international law in the settlement of international disputes, including China's capability for presenting and defending its legal arguments. Furthermore, these actions also demonstrate how China, in addition to using legal "weapons," takes advantage of its growing political and economic power in the settlement of international disputes.

8

Conclusion

Taking Chinese Exceptionalism Seriously

After the September 11 terrorist attacks and subsequent birth of the Bush Doctrine,¹ “American exceptionalism” has emerged as a fashionable term among commentators and a policy concern for many states,² even though it has existed since the very founding of the U.S. Although arguably being often used “far too loosely and without meaningful nuance,”³ American exceptionalism roughly refers to the presumption that “Western civilization represents the apex of this history, and that the United States embodies the best and most advanced stage of Western-civilization and, therefore, human history to date” and is a policy wherein the U.S. seeks to superimpose “the U.S. model onto international economic, political, and legal system as well as individual states across the planet.”⁴ Arguably, American exceptionalism arises from its religion, liberty, geography, and material abundance.⁵ According to Buzan, there are four characteristics of American exceptionalism: liberalism, moralism, isolationism/unilateralism, and anti-statism.⁶

American exceptionalism has both positive and negative sides.⁷ On the one hand, the U.S. led the rebuilding of the wartorn world order in the 1940s and from then on has continually invested tremendous resources in maintaining international peace and security. On the other hand, American exceptionalism runs the risk of placing the international order in peril as

¹ Christian Henderson, *The Bush Doctrine: From Theory to Practice*, 9 *J. Conflict & Sec. L.* 3 (2004).

² See, e.g., Michael Ignatieff ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005); Donald E. Pease, *The New American Exceptionalism* (Minneapolis: University of Minnesota Press, 2009); Natsu Taylor Saito, *Meeting the Enemy: American Exceptionalism and International Law* (New York: New York University Press, 2010); Jason A. Edwards and David Weiss eds., *The Rhetoric of American Exceptionalism* (Jefferson: McFarland & Company, Inc., Publisher, 2011).

³ Harold Hongju Koh, *On American Exceptionalism*, 55 *Stan. L. Rev.* 1479 (2003) 1482.

⁴ Natsu Taylor Saito, at 229.

⁵ Feng Zhang, *The Rise of Chinese Exceptionalism in International Relations*, 19 (2) *Eur. J. Int'l Rel.* 305 (2011) 318. See also James W. Ceaser, *The Origins and Character of American Exceptionalism*, 1 *Am. Pol. Thought* 3 (2012).

⁶ Barry Buzan, *The United States and the Great Powers: World Politics in the Twenty-First Century* (Cambridge: Polity Press, 2004) 156–164.

⁷ Harold Hongju Koh, at 1480.

evidenced by the Bush Doctrine, which denigrates international law.⁸ In particular, American exceptionalism is dogged by “double standards.”⁹ This means that, although the U.S. requires that other states abide by international law, it regularly disregards international law.¹⁰ Obviously, “double standards” is sustained by American prevailing power over other countries. According to Koh, the “double standards” presented “the most dangerous and destructive form of American exceptionalism.”¹¹ This is why many countries were particularly wary of “American exceptionalism” of the Bush administration, which wielded American power in an unfettered manner. It thus comes as no surprise that many people debate on American exceptionalism, but we do not talk about British exceptionalism or German exceptionalism, and so on.

Ironically, as American power declines relatively, it is suggested that “America must learn to think of themselves as more ordinary.”¹² Recently, President Trump openly said that he does not like the term “American exceptionalism” at all.¹³ Some commentators suggest that President Trump is damaging American exceptionalism.¹⁴ According to Koh, however, American exceptionalism will survive the Trump administration.¹⁵ Thus, whether the retreat of American exceptionalism really happens remains to be seen.

The knowledge of American exceptionalism should help inform debates on the interplay between international law and China, a rising power that perhaps is the sole state with the potential to really challenge American hegemony and leadership in international society. In short, as China rises as a great power, it is not fanciful to raise several concerns: Is there Chinese exceptionalism? If so, why is there Chinese exceptionalism, and what does Chinese exceptionalism mean? And finally, what will Chinese exceptionalism bring to the world where we live today?

⁸ See, e.g., Joel R. Paul, *The Bush Doctrine: Making or Breaking Customary International Law*, 27 *Hastings Int'l & Comp. L. Rev.* 457 (2003–2004).

⁹ Harold Hongju Koh, at 1495–1500. See also T. Jeremy Gunn, *American Exceptionalism and Globalist Double Standards: A More Balanced Alternative*, 41 *Colum. J. Transnat'l L.* 137 (2002).

¹⁰ See generally Helen Keller and Daniela Thurnherr, *Taking International Law Seriously: A European Perspective on the U.S. Attitude Towards International Law* (Berne: Staempfli Publishers Ltd., 2005); John F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2005); Nicole Deller, Arjun Makhijani, and John Burroughs eds., *Rule of Power or Rule of Law?: An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties* (New York: The Apex Press, 2002).

¹¹ Harold Hongju Koh, at 1483, 1486–1487.

¹² James W. Ceaser, at 12.

¹³ “Watch Trump say he doesn’t believe in ‘American exceptionalism,’” at <https://www.youtube.com/watch?v=72wM6cqPS-c> (last visited May 19, 2019).

¹⁴ See, e.g., Noah Smith, *Against Walls: How President Trump’s Walling Initiatives Undermine American Exceptionalism*, 31 *Geo. Immigr. L.J.* 623 (2017).

¹⁵ See generally Harold Hongju Koh, *The Trump Administration and International Law* (Oxford: Oxford University Press, 2019).

According to Bradford and Posner, American exceptionalism is not unique; all great powers, including China, are exceptionalists, advocating international law that “reflect their values and advance their interests.”¹⁶ They argue that “the United States is no more than any other powerful country.”¹⁷ According to them, American exceptionalism is defined as “negative liberties and market” and “military force to maintain global order” while Chinese exceptionalism is characterized by strict sovereignty and developmentalism.¹⁸ This implies that China may hold an exceptionalism distinct from that of the U.S., thereby bringing about different implications on international legal order. Unfortunately, Bradford and Posner failed to further explore whether Chinese exceptionalism may bring new promise for international legal order; if so, what.

According to Zhang, there existed Chinese exceptionalism in the imperial era (221 BC–AD 1911), which was characterized by sinocentrism, pacifism, and inclusionism and that during the time of the revolutionary PRC (1949–1976), which was characterized by revolutionary sinocentrism.¹⁹ However, China’s influences on the outside world were limited for centuries because different parts of the world were largely isolated from each other and because China was not powerful enough to project its values around the globe. However, as China rises as a great power and the world currently enters a “global village,” it is time to take the issue of Chinese exceptionalism seriously. According to Zhang, Chinese exceptionalism is currently created by new international structural situations and the interactions between material structure, history, and culture in producing particular kinds of exceptionalism at different times.²⁰ Zhang identifies three components of Chinese exceptionalism in the context of China’s rise: great power reformism, benevolent pacifism, and harmonious inclusionism.²¹

China’s government and leaders have never openly referred to “Chinese exceptionalism.” As discussed in previous chapters, however, China’s leaders have always proclaimed that China is exceptional. For instance, as early as 1978, Deng Xiaoping pledged that China would never seek hegemony, even though it would be a powerful state one day. Clearly, it appears that China, during its recent rise as a great power, has felt more compelled to convince international society that Chinese exceptionalism in the twentieth century differs from that

¹⁶ Anu Bradford and Eric A. Posner, *Universal Exceptionalism in International Law*, 52 *Harv. Int’l L.J.* 1 (2011) 5.

¹⁷ *Id.*

¹⁸ *Id.*, at 35–40, 25–31.

¹⁹ Feng Zhang, at 308–310.

²⁰ *Id.*, at 314.

²¹ *Id.*, at 310–314.

in the imperial era and the revolutionary PRC era; more importantly, it seeks to prove that it is significantly different from American exceptionalism.

Chinese exceptionalism arguably has become a serious policy concern in the context of China's rise. For China's part, it assumes that Chinese exceptionalism will bring a new promise for building a more peaceful, prosperous, win-win world. China's Peaceful Development Road (2011) states that

China's peaceful development has broken away from the traditional pattern where a rising power was bound to seek hegemony. . . . With a keen appreciation of its historical and cultural tradition of several thousand years, the nature of economic globalization, changes in international relations and the international security landscape in the 21st century as well as the common interests and values of humanity, China has decided upon peaceful development and mutually beneficial cooperation as a fundamental way to realize its modernization, participate in international affairs and handle international relations. The experiences of the past several decades have proved that China is correct in embarking upon the path of peaceful development, and there is no reason whatsoever for China to deviate from this path.²²

Implicit in China's Peaceful Development Road (2011) are the dynamics underlying Chinese exceptionalism, namely, "[Chinese] historical and cultural tradition of several thousand years, the nature of economic globalization, changes in international relations and the international security landscape in the 21st century as well as the common interests and values of humanity." As illustrated by the discussions in previous chapters, especially those on the transformation of international law and the changing state identity of China, the explanation provided in China's Peaceful Development Road (2011) appears reasonable, albeit not exhaustive nor uncontestable. In brief, both internal factors and external factors contribute to a Chinese exceptionalism that is significantly different from American exceptionalism. For instance, given its far from perfect record of human rights protection, it is unlikely that China, in handling international relations, will place the same importance on human rights as the U.S. does.

In my opinion, the vision of "a Community of Shared Future for Mankind," which has been included in China's constitution in 2018, represents a major effort to clarify Chinese exceptionalism. In the speech delivered before the UN General Assembly in September 2015, President Xi called for building "a

²² China's Peaceful Development Road (2011), Part V.

Community of Shared Future for Mankind.” President Xi’s speech is worth the lengthy citation that follows:

- We should build partnerships in which countries treat each other as equals, engage in mutual consultation and show mutual understanding. The principle of sovereign equality underpins the UN Charter. The future of the world must be shaped by all countries. All countries are equals. The big, strong and rich should not bully the small, weak and poor. The principle of sovereignty not only means that the sovereignty and territorial integrity of all countries are inviolable and their internal affairs are not subjected to interference. It also means that all countries’ right to independently choose social systems and development paths should be upheld, and that all countries’ endeavors to promote economic and social development and improve their people’s lives should be respected. We should be committed to multilateralism and reject unilateralism. We should adopt a new vision of seeking win-win outcomes for all, and reject the outdated mindset that one’s gain means the other’s loss or that the winner shall take all. Consultation is an important form of democracy, and it should also become an important means of exercising contemporary international governance. . . . We should forge a global partnership at both international and regional levels, and embrace a new approach to state-to-state relations, one that features dialogue rather than confrontation, and seeks partnership rather than alliance. Major countries should follow the principles of no conflict, no confrontation, mutual respect and win-win cooperation in handling their relations. Big countries should treat small countries as equals, and take a right approach to justice and interests by putting justice before interests.
- We should create a security architecture featuring fairness, justice, joint contribution and shared benefits. . . . No country can maintain absolute security with its own effort, and no country can achieve stability out of other countries’ instability . . .
- We should promote open, innovative and inclusive development that benefits all. . . . The growing gap between rich and poor is both unsustainable and unfair . . . Development is meaningful only when it is inclusive and sustainable. . . .
- We should increase inter-civilization exchanges to promote harmony, inclusiveness and respect for differences. . . . The world is simply more colorful as a result of its cultural diversity. Diversity breeds exchanges, exchanges create integration, and integration makes progress possible. In their interactions, civilizations must accept their differences. Only through mutual respect, mutual learning and harmonious coexistence can

the world maintain its diversity and thrive. Each civilization represents the unique vision and contribution of its people, and no civilization is superior to others. Different civilizations should have dialogue and exchanges instead of trying to exclude or replace each other. . . . We should respect all civilizations and treat each other as equals. . . .²³

According to China's vision of "a Community of Shared Future for Mankind," Chinese exceptionalism is characterized by partnership based on state sovereignty, pacifism based on common security, and inclusionism based on national diversities. There remain many uncertainties in the future of Chinese exceptionalism, however. For instance, the partnership element of Chinese exceptionalism encourages more cooperation instead of unilateral behaviors among states, while pacifism discourages the abuse of force. In this sense, Chinese exceptionalism will bring new promise for a more participatory and less confrontational world. Actually, Ginsburg suggested that China may bring about a "kinder, gentler" Westphalia.²⁴ However, Chinese exceptionalism may also pose potential challenges. For instance, implicit in this inclusionism is the requirement that China's particularities should be respected by other countries. In this sense, Chinese exceptionalism, though being defensive rather than offensive, might be doubted in that China, in an indirect manner, imposes its will on other countries. Thus, Zhang is right in pointing out that both American exceptionalism and Chinese exceptionalism "have their own promises and problems."²⁵ A safe argument for me is that it is high time to take Chinese exceptionalism seriously!

²³ Xi Jinping, Working Together to Forge a New Partnership of Win-win Cooperation and Create a Community of Shared Future for Mankind (September 29, 2015).

²⁴ Tom Ginsburg, Eastphalia as the Perfection of Westphalia, 17 *Ind. J. Global Legal Stud.* 27 (2010) 45.

²⁵ Feng Zhang, at 320.

Index

For the benefit of digital users, indexed terms that span two pages (e.g., 52–53) may, on occasion, appear on only one of those pages.

- Abe, Shinzō, 312–13
Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 290–91
adjudication systems, 26
Administrative Procedural Law (APL), 243–44, 249–50, 260–61
Afghanistan, 270–71
Africa:
 Chinese claims of solidarity with, 78
 Chinese military aid to, 77–78, 92n323
 CPR in, 145
 cyberspace governance in, 150–52
 European colonization in 19th century, 16
 And Five Principles, 86–87
 and Third World, 53–54
African Capability for Immediate Response to Crisis, 92n323
Agreement on deepening military trust in border regions, 184–85
Agreement on Government Procurement (GPA), 128
Agreement on reduction of military forces in border regions, 184–85
Agreement on Subsidies and Countervailing Measures (SCM Agreement), 214, 222–24, 225
Agreement on the Trade and Intercourse between the Tibet Region of China and India, 79
Agreement on Trade in Goods, 173–74
Agreement on Trade in Service, 173–74
AIIB (See Asian Infrastructure Investment Bank)
Alexander VI, Pope, 61–62
Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, 277–78
Al-Qahtani, Mutlaq, 185–86
Alvarez, José E., 94–95, 156, 160
“America First,” 91
American exceptionalism, 321–22
Annan, Kofi, 32–33, 114–15
Annecy Round, 18–19
Anti-Rightist Campaign, 47–48
APEC (See Asia-Pacific Economic Cooperation)
APL (See Administrative Procedural Law)
Aquino, Benigno III, 296–97
Areios Pagos, 253–54
Articles of Agreement (AIIB), 188–89
Asai, Motofumi, 313
ASEAN (See Association of Southeast Asian Nations)
ASEAN-China Economic Agreement, 173–74
ASEAN-China Joint Working Group (JWG), 175–76
ASEAN-China Ministerial Meeting (PMC), 175–76
ASEAN Declaration, 172
Ashizawa, Kuniro, 45
Asia:
 and AIIB Articles of Agreement, 189
 European colonization in 19th century, 16
 and Mao’s “Three Worlds Theory,” 53–54
Asia-Africa Bandung Conference (1955), 78
Asian Infrastructure Investment Bank (AIIB), 92–93, 182, 183, 187–88
Asia-Pacific Economic Cooperation (APEC), 187–88
ASP (Assembly of State Parties), 168, 169–70
Association of Southeast Asian Nations (ASEAN), 167, 172
Austin, John, 26n67
Australia, 53–54
Austria, 20
automatic incorporation, 248
bad faith, 279, 315–16
Bandung Conference, 86–87
Bangkok Declaration (See ASEAN Declaration)
Bauman, Zygmunt, 43–44
Bederman, David J., 30
behavior, 43

- Beibu Bay, 282
 Beijing, China, 187–89, 193, 215–16, 247, 301
 Beijing Consensus, 240–41, 248
 Beijing First Intermediate People's Court, 256, 257–58
 Beijing Urban Construction Group (BUCG), 227–28
Beijing Urban Construction Group (BUCG) v. Republic of Yemen, 227
 Bennett, Yan Chang, 38
 Benvenisti, Eyal, 238–40
 Berne Convention for the Protection of Literary and Artistic Works, 263
 bilateral investment treaty (BIT), 133, 135–36
 bilateralism, 17–18, 133
 BIT (*See* bilateral investment treaty)
 Blank, Stephen, 185–86
 Blokker, Niels M., 156
 Bo'ao Asia Forum, 73
 Board of Governors of the IMF, 182
 Bolshevik Revolution, 46
 BOR (*See* One Belt and One Road initiative)
 Bower, Adam, 24–25
 Brazil, 136
 Bretton Woods agreement, 166
 BRICS (Brazil, Russia, India, China, and South Africa), 150–52, 181
 BRICS Summit (2014), 182
Broches' Test, 227
 Brunei Darussalam, 172
 BUCG (*See* Beijing Urban Construction Group)
 Bull, Headley, 14n2, 61–62, 155
 Burke, Peter J., 44
 Burma, 79, 86–87
 Bush, G. W., 271
 Bush Doctrine, 321–22
 Buzan, Barry, 1–2, 321
 Byers, Michael, 280–81
Byrd Amendment (*See* *US-Offset Act*)
- Cambodia, 175–76
 Canada, 53–54, 115, 136
 Carlson, John, 270–71
Case Concerning Military and Paramilitary Activities in and against Nicaragua, 27–28, 29
 Cassese, Antonio, 30–31
 CAT (*See* International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)
 Catholics, 15–16
 CBRC (China Banking Regulatory Commission), 122
 CCP (*See* Chinese Communist Party)
- CDR (*See* Common but Differentiated Responsibility)
 Century of Humiliation, 242–43
 CFIUS (*See* Committee on Foreign Investment in the U.S.)
 change in international law, 13–39
 Chinese/global community's effect on, 14–20
 effect of adjudication systems on, 26
 effect of shifting power dynamics on, 20, 85–91
 relevance to China of, 35
 and spirit of laws, 30
The Changing Structure of International Law (Friedmann, Wolfgang), 146
 Charter of Economic Rights and Duties of States, 77, 171
 Chaumon Treaty (1814), 16n12
 Chayes, Abram, 101–2, 105–6
 Chayes, Antonia Handler, 101–2, 105–6
 Chengjiéer, 250–51
 China-Arab States Cooperation Forum, 150–52
 China-ASEAN Senior Officials' Meeting (SOM), 173–74
 China National Offshore Oil Corp. (CNNOC), 229–30
 China-North Korea Alliance Treaty (1961) (*See* Mutual Aid and Cooperation Friendship Treaty with North Korea)
 China-Philippines SCS Arbitration, 8, 167, 294, 303, 312, 315
 China-Portugal Joint Declaration on the Question of Macao, 205–6
 China's Foreign Trade (2011), 128–30
 China's WTO Accession Protocol (*See* Protocol on the Accession of the People's Republic of China)
 China-U.S. trade war, 3, 126, 298, 306, 313, 316
 China-USSR Alliance Treaty (1950) (*See* Treaty of Friendship, Alliance and Mutual Assistance)
China—Value-Added Tax case, 288
 Chinese Communist Party (CCP):
 in civilization, 66–67
 and global governance, 90
 and G-7, 166–67
 and judiciary of China, 245
 in rule-of-law state, 59, 60–61
 as socialists, 46–49, 50–52, 82
 and SOEs, 217–20
 and UN, 177, 198
 and WTO regime, 129–30

- Chinese exceptionalism, 321–26
- Choice of Law for Foreign-Related Civil Relations, 243–44
- Chongqing Grand Bombing, 255–56
- Chongqing High People's Court, 255–56
- Chongqing Zhengtong Pharmaceutical Co. Ltd. v. Trademark Review & Adjudication Board*, 252–53
- Christianity, 15–16, 62–64
- CISG (See UN Convention on Contracts for the International Sale of Goods)
- civil and political rights (CPR), 144, 145
- CLC (See International Convention on Civil Liability for Oil Pollution Damage)
- Clinton, Hillary Rodham, 303–4
- CNOOC (See China National Offshore Oil Corp.)
- Code of Conduct in the South China Sea, 174–75
- Cogan, Jacob Katz, 158–59
- Cohen, Jerome Alan, 282–83
- Cold War, 19, 32–33, 62–64, 110, 145, 172–73
- COMECON (See Council for Mutual Economic Assistance)
- Committee on Economic, Social and Cultural Rights, 260
- Committee on Foreign Investment in the U.S. (CFIUS), 229–30
- Common but Differentiated Responsibility (CDR), 85
- Common Program of Chinese People's Political Conference, 46–47, 58
- Communist Party, 46, 58–59
- Communist Revolution, 46
- community, 14n2, 14–20
- community dispute settlement, 273
- Community of Latin American and Caribbean States, 150–52
- Community of Shared Future for Mankind, 107–8
- Company Law (China), 219
- Concert of Europe (1815), 16
- Confucianism, 56, 64–66, 210–11, 282–83
- Confucius, 64–65
- Constitution, Chinese (1954), 46–48, 76, 198, 199–200
- Constitution, Chinese (1975), 76, 79, 91
- Constitution, Chinese (1982), 49, 59, 66, 79, 91, 199–200, 206, 242–45
- Amendment (1993), 49, 50
- Amendment (2008), 50
- Amendment (2018), 51
- Constitution, U.S., 111, 237
- conventional thinking, 69–70
- Convention Concerning Occupational Safety and Health and the Working Environment, 251–52
- Convention on Contracts for the International Sale of Goods (CISG), 233–34, 262–63
- Convention on the Elimination of All forms of Discrimination against Women, 140
- Convention on the Prevention and Punishment of the Crimes of Genocide, 168n65
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 207–8, 262–63
- Council for Mutual Economic Assistance (COMECON), 79–80
- courts, 233–66
- application of international law in, 240–51, 264
- automatic incorporation in, 248
- Chinese constitution and, 242–45
- consistent interpretation in, 251
- extensions to states authority by, 261
- immunity in, 253
- and individual rights, 259, 262
- national vs. domestic, 235–38
- professional competence in, 246
- strategy in, 240
- structure of, 253–62
- transformation of, 250
- Covenant of League of Nations, 158–59
- CPR (See civil and political rights)
- Crawford, James, 213–14
- Crimea, 166
- Cultural Great Revolution, 47–48
- Cultural Revolution (1966–1976), 263–64
- cybersecurity governance, 146
- Cybersecurity Law (2016), 150–52, 151n313
- Daoism, 210
- Decision Concerning some Major Issues in Comprehensively Deepening Reforms, 51, 59
- Declaration of the SCS, 174–75
- Declaration on the Conduct of Parties in the South China Sea (DOC), 174–76
- Declaration on the Establishment of a New International Economic Order, 171
- Declaration on the Right to Development, 143
- Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (China), 221
- Deng Xiaoping:
- on capitalism, 52n73
- on Great Proletarian Cultural Revolution, 47n45
- on hegemony, 323–24

- Deng Xiaoping: (*Cont.*)
 on leadership, 86, 91
 on Reforming and Opening-up Policy, 50–51,
 53–54, 59, 80–81, 103–4
 on socialism, 195–97
 on superpowers, 70–72
- developing states, 52–54
- development regimes, 126–32
- Diaoyu Islands, 257, 264–65
- Dillon Round, 18–19
- dispute settlement, 267–319
 China-Philippines SCS Arbitration, 294, 303,
 312, 315
 China-U.S. Trade War, 298, 306, 313, 316
 community vs. individual, 273
 good faith vs. bad faith in, 279, 315–16
 lawfare in, 270, 292, 303–16
 normative analytical framework for, 270–79
 policies/practice on international, 281–92
 politics vs law in, 276
- dispute settlement body (DSB), 27, 29, 285–92,
 310–11, 316–17
- dispute settlement understanding (DSU), 84,
 129, 291–92
- DOC (*See* Declaration on the Conduct of
 Parties in the South China Sea)
- domestic courts, 235–38
- domestic governance, 94
- domestic institutions, 194–228
- Dongsha Islands, 294–95
- Dongsha Qundao, 296
- Downs, George W., 238–40
- Drafting and Credentials Committees, 168–69
- Draft International Convention on Foreign
 Judicial Sales of Ships and their
 Recognition, 264
- DSB (*See* dispute settlement body)
- DSU (*See* dispute settlement understanding)
- Dunlap, Charles J., 270–71, 293
- Duterte, Rodrigo Roa, 296–97, 298
- East China Sea, 167
- East China Sea Air Defense Identification
 Zone, 257
- EC (*See* European Community)
- e-commerce, 132
- economic, social, and cultural rights (ESCR),
 144, 145
- economic power, 22, 54
- Eder, Thomas, 285
- Engels, Frederick, 48
- English School, 14n2
- entrepreneurship, 107–12
- Environmental Protection Law, 244n58
- era of identities, 43
- ESCR (*See* economic, social, and cultural rights)
- EU Commission, 83–84, 91–92, 129, 144
- Europe, 15–22, 53–54, 64–65, 75, 209
- European Community (EC), 144, 145
- European Union (EU), 84, 129, 164–65, 167,
 180–81, 230, 264, 290, 310–11
- evolution of China's identity, 46–67
- Ewelukwa, Uché U., 135–36
- Executive Board (IMF), 182
- falling civilized state, 61–66
- FDI (*See* foreign direct investment)
- FED (*See* Friends of E-commerce for
 Development)
- Federal Republic of Yugoslavia, 119–20
- federative relations, 194, 195–96
- Feinerman, James V., 5
- FIFD (*See* Friends of Investment Facilitation for
 Development)
- Fifth Amendment, 111, 237
- Final Act of the Conference, 169–70
- FINSA (*See* Foreign Investment and National
 Security Act)
- Five Principles of Peaceful Coexistence,
 79, 86–88
- foreign direct investment (FDI), 132–34
- Foreign Investment and National Security Act
 (FINSA), 229–30
- foreign relations, 194
- Foreign Sovereign Immunities Act, 221
- Forum on China-Africa Cooperation, 150–52
- “Four Modernizations,” 80–81
- Framework Agreement on Comprehensive
 Economic Cooperation between
 ASEAN, 135–36
- France, 158–59, 181, 182
- Franck, Susan D., 101–2
- free trade agreements (FTAs), 23–24, 133
- Friends of E-commerce for Development
 (FED), 132
- Friends of Investment Facilitation for
 Development (FIFD), 110–11, 136–37
- Garrick, John, 38
- GDP (*See* gross domestic product)
- General Agreement on Tariffs and Trade
 (GATT), 18–19, 77, 80–81, 179–80, 182,
 216, 309–10, 311–12, 314–15, 316–17
- General Principles of Civil Law (GPCL), 249

- General Treaty for the Renunciation of War (1928), 30–31
- Geneva Round, 18–19
- Germany, 133, 166, 181, 182, 253–54
- Going Abroad strategy, 132–33
- Goldsmith, Jack L., 91, 271
- good faith, 279, 315–16
- GPA (*See* Agreement on Government Procurement)
- GPA Agreement on Government Procurement, 128
- GPCL (*See* General Principles of Civil Law)
- Great Leap Forward, 47–48, 103–4
- Greece, 253–54
- Greek Special Highest Court, 253–54
- gross domestic product (GDP), 54
- Group of 7 (G-7), 166, 209–10
- Group of 77 (G-77), 77, 110–11, 170
- Grundlagenvertrag* case, 253–54
- G-7 (Group of 7), 166, 209–10
- G-77 (Group of 77), 77, 110–11, 170
- G-20 Summit, 136–37
- Guangdong, 247
- Guideline on corporate governance of SOEs, 217–18, 219, 220
- Guideline on the deepening SOE reforms, 217–18, 219, 220
- Guiding Principles for Global Investment Policymaking, 136n226, 136–37, 207
- Gulf War, 166
- Guzman, Andrew T., 106
- Han Dynasty, 56
- “Harmonious World,” 88, 97–98
- Harvard University, 55–56, 68
- Hedley, Bull, 22
- Hegel, Georg Wilhelm Friedrich, 64–65
- Henkin, Louis, 4–5, 34, 196
- He Rong, 111–12
- High-Level Declaration of the Rule of Law at National and International Level, 33
- HIL (hegemonic international law), 160–61
- Holy Roman Empire, 15–16
- Honduras, 261–62
- Hong Kong, 88–89, 254
- Hostages* case, 274–75
- How Nations Behave* (Henkin), 4–5
- Huang Huikang, 262
- Hu Jintao, 55, 73, 240–41
- human rights, 137
- Human Rights Commission of the UN, 81–82
- Hungdah Chiu, 282–83
- Huntington, Samuel P., 62–63
- ICC (*See* International Criminal Court)
- ICCPR (*See* International Covenant on Civil and Political Rights)
- ICESCR (*See* International Covenant on Economic, Social and Cultural Rights)
- ICISS (*See* International Commission on Intervention and State Sovereignty)
- ICJ (*See* International Court of Justice)
- ICJ Statute, 111
- ICSID (*See* International Centre for Settlement of Investment Disputes)
- ICT (*See* information and communication technology)
- identity standards, 43
- ideology, 75
- Ikenberry, John, 1, 109
- ILC (*See* International Law Commission)
- IMF (*See* International Monetary Fund)
- immunity, 253
- Imperialists, 65
- India, 79, 86–87, 178–79, 184–85
- India Ocean, 294–95
- individual dispute settlement, 273
- individual rights, 259, 262
- Indonesia, 172, 187–88
- Industrial Revolution, 16
- information and communication technology (ICT), 146–47, 148–49, 150
- Inspired of the Laws* (Montesquieu), 30
- institution(s), 155–232
- AIIB as, 187
- ASEAN as, 172
- domestic, 194–228
- in foreign relations, 194
- and great powers, 157–62
- G-7 as, 166
- G-77 as, 170
- ICC as, 168
- international, 157–87
- mechanisms for Chinese courts’ engagement with international law in, 206
- public-private mechanisms in, 208–28
- public-public mechanisms in, 195–206
- SCO as, 184
- scope of, 155
- and SOEs, 213, 215–28
- treaty-making mechanisms in, 198
- UN as, 177
- WTO, IMF, and WB as, 179
- Interim Constitution of the PRC, 46–47

- International Centre for Settlement of Investment Disputes (ICSID), 133, 226, 227
- International Code of Conduct for Information Security, 150
- International Commission on Intervention and State Sovereignty (ICISS), 115–16
- International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 249, 259–61
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 263
- International Convention on the Elimination of All Forms of Racial Discrimination, 140
- International Court of Justice (ICJ), 5, 26–35, 28n87, 109, 111, 159, 265, 274–88
- International Covenant on Civil and Political Rights (ICCPR), 73–75, 95–96, 96n344, 137–38, 142, 144, 212–13
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 105–6, 140, 144, 249, 259, 260
- International Criminal Court (ICC), 168, 271
- international dispute settlement, 281–92
- international institutions, 157–87
- international law, change in (*See* change in international law)
- International Law as Ideology, 273
- International Law Commission (ILC), 23–24, 109, 168n65, 199–200, 213–19, 224
- international legal policies, 69–97
- International Maritime Bureau, 261–62
- International Monetary Fund (IMF), 80–81, 158–59, 176–77, 179
- international power, 20–22
- International Strategy of Cooperation on Cyberspace, 148–49
- International Tribunal for the Law of the Sea (ITLOS), 5, 27, 288, 290–91
- Investment Agreement, 173–74
- investment treaties, 132
- investor-state dispute settlement (ISDS), 133, 136, 226, 288
- Iran, 120, 276, 277–78
- Iraq War (2003), 110, 166
- Islam, 63–64
- ITLOS (*See* International Tribunal for the Law of the Sea)
- Jackson, John H., 180–81
- Jackson v. People's Republic of China*, 254
- Janis, M. W., 276
- Japan:
- in ASEAN, 174
 - bilateral relationships with China, 313
 - economic success of, 22, 30–31
 - on G-7 membership of China, 166–67
 - and immunity, 256–58
 - in UNSC, 178–79
 - in WTO, 290
- Jenkins, Richard, 43, 45
- Jiang Zemin, 92–93, 293
- Qiao Liang, 293
- Jin Liqun, 188–89, 191–92
- Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, 256–58
- Joint Comprehensive Plan of Action, 277–78
- Joint Declaration of the Seventy-Seven Developing Countries, 170–71
- Joint Ministerial Statement on Investment Facilitation for Development, 110–11, 136–37
- Joint Statement on Cooperation in Information Space Development, 150–52
- Judge Law (1995), 246–47
- Judge Law (2001), 245, 246–47
- Judicial Selection Committees (JSC), 247–48
- jus cogens* norms, 255–56
- JWG (*See* ASEAN-China Joint Working Group)
- Kampf, David, 138–39
- Kant, Immanuel, 64–65, 94–95
- Kassianova, Alla, 45
- Kazakhstan, 184–85
- Kennedy, David, 231
- Kennedy, Paul, 22, 52–54, 69, 155–56
- Kennedy Round, 18–19
- Kent, Ann, 162–64, 211
- Kinzelbach, Katrin, 6
- Kittrie, Orde F., 271–72, 292–93
- Koh Hongju, 321–22
- Korea-Commercial Vessels*, 222
- Korean War, 177
- Koskenniemi, Martti, 34
- Ku, Julian, 37–38, 267–68, 285–86, 287
- Kuomintang government, 58
- Kyoto Protocol, 85
- Kyrgyzstan, 184–85
- Laos, 172
- Latin America, 18, 19, 53–54, 150–52
- Lauterpacht, H., 273–74, 277
- lawfare, in dispute settlement, 270, 292, 303–16
- Lawfare: Law as a Weapon of War* (Kittrie), 271, 272

- law in dispute settlement, 276
- law of armed conflict (LOAC), 270–71
- Law of Organization of Courts, 245
- Law of the People's Republic of China on the Procedures for the conclusion of Treaties, 200–1, 202, 205–6
- Law on Exclusive Economic Zone and the Continental Shelf (1998), 305
- Law on the Exploration and Exploitation of Deep Seabed Resources, 111–12
- League of Nations, 16–17, 26, 158–59
- Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, 290–91
- Legalism, 56, 64–65, 210–11
- Legislation Law, 201–2, 243
- Leibniz, William Jones, 64–65
- Libya, 28–29
- Li Guoguang, 250–51
- Liu Huaqiu, 138n230
- Liu Zhenmin, 88, 312
- LOAC (*See* law of armed conflict)
- Locke, John, 194–96
- Lomé Convention, 144
- Longines Co. v. Trademark Review & Adjudication Board*, 250–51, 259
- Long Yongtu, 87–88
- Malaysia, 172, 261–62
- Manchuria, 30–31
- Manila Declaration (*See* Declaration of the SCS)
- Mann, F. A., 196
- Mao Zedong, 47–48, 53–54, 76–77, 79–80, 165, 176–77, 212–13
- Marshall case*, 34–35
- Marshall Island, 34–35
- Martial Law Institute (MLI), 293
- Marx, Karl, 48
- Marxism-Leninism, 46, 47–48, 57–58, 75, 97
- Ma Xinmin, 294
- Mearsheimer, John J., 2–3, 69–70
- Memorandum of Understanding (AIIB), 187–88
- Mexico, 136
- MFA (*See* Ministry of Foreign Affairs)
- micro, small, and medium-sized enterprises (MSMEs), 132
- Middle East, 110–11, 150–52, 166
- “Middle Kingdom,” 1, 41, 52
- military power, 22
- Mine Ban Treaty (1997), 24–25
- Mingxiayu 01971 case*, 264–65
- Ministry of Commerce (MOC), 122
- Ministry of Foreign Affairs (MFA), 54–55, 107, 121–25, 206–7, 243–44, 256–57, 262, 286, 294
- Ministry of Public Security (MPS), 259–60
- Ministry of Transport (MOT), 121–22
- MLI (*See* Martial Law Institute)
- MOC (*See* Ministry of Commerce)
- Mohism, 210
- Montesquieu, Charles Louis, 30
- Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 28–29
- MOT (*See* Ministry of Transport)
- MPS (*See* Ministry of Public Security)
- MSMEs (*See* micro, small, and medium-sized enterprises)
- Mutual Aid and Cooperation Friendship Treaty with North Korea, 76–77, 84–85
- M. V. Petro Ranger*, 261–62
- M. V. Wilby*, 261–62
- NAFTA (*See* North American Free Trade Agreement)
- Nanhai Zhudo, 296
- Nanning XX Service LLC v. Nanning XX Bureau*, 251–52
- Nansha Islands, 294–95
- national courts, 235–38
- National People's Congress (NPC):
 - and automatic incorporation, 249–50
 - and Chinese judiciary, 245
 - and public-private mechanisms, 212–13
 - and public-public mechanisms, 197–206
 - role in extending states' authority, 261, 264–65
 - role in reviving civilization, 66–67
 - and UN sanctions, 121–22
- National People's Congress Standing Committee (NPSC), 121–22
- National Security Report of 2017, 3
- national security review (NSR), 229–30
- national treatment (NT), 133–34
- NATO (*See* North Atlantic Treaty Organization)
- Navigation Safety Convention (1988), 262
- Neuhold, H., 101–2
- New Development Bank, 183
- New International Economic Order (NIEO), 77, 171
- New York Convention (*See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards)
- NGOs (*See* non-government organizations)
- Nguyen Xhan Phuc, 298
- Nicaragua, 27–28, 28n87

- NIEO (*See* New International Economic Order)
- 9/11 terrorist attacks, 278–79, 321
- Nishimatsu Construction* case, 256–57
- Nollkaemper, André, 233–34, 246
- Non-Alliance Movement, 110–11
- non-government organizations (NGOs), 107
- non-market economy, 83–84
- normative analytical framework for dispute settlement, 270–79
- norm compliance, 102–5
- North American Free Trade Agreement (NAFTA), 136
- North Atlantic Treaty Organization (NATO), 70, 185–87
- North Korea, 76–77, 84–85, 120, 123–26
- NPC (*See* National People's Congress)
- NPCSC (*See* Standing Committee of the NPC)
- NPT (*See* Nuclear Non-Proliferation Treaty)
- NSR (*See* national security review)
- NT (*See* national treatment)
- Nuclear Non-Proliferation Treaty (NPT), 34–35
- Nuclear Tests* case, 29
- Nye, Joseph, 22
- Obama, Barack, 7, 22, 23–24, 113
- Oil War, 166
- One Belt and One Road initiative (BOR), 92–93, 97–98, 192–93, 236–37, 241, 265
- Opium War (1839), 52, 64–65, 242–43
- orthodox socialist, 46–48, 80
- Ottoman Empire, 62–63
- Owen, Roberts B., 275
- Pacific Ocean, 294–95
- Pakistan, 184–85
- Panama, 264–65
- PAP (*See* People's Action Party)
- paper compliance, 104–5
- Paracel Islands (*See* Xisha Islands)
- Paris Agreement, 93n326, 92–93
- Paris Convention on the Protection of Industrial Property, 252–53, 263
- PCIJ (*See* Permanent Court of International Justice)
- peace, 113
- Peaceful Development Road (2005), 73–75, 76
- Peaceful Development Road (2011), 68–69, 72, 73–75, 92–93, 324
- “Peaceful Rise,” 55, 72–73
- Peace of Westphalia, 15–16
- Peerenboom, Randall, 61
- People's Action Party (PAP), 217–18
- People's Liberation Army (PLA), 293
- Permanent Court of International Justice (PCIJ), 26, 282, 283
- PFM (*See* Preliminary Founding Members of AIIB)
- Philippines, 169–70, 172, 174–75, 294, 303, 312, 315
- Pkulaw.cn, 252, 259, 263
- PLA (*See* People's Liberation Army)
- PLA Academy of Military Science, 293
- PMC (*See* ASEAN-China Ministerial Meeting)
- Political Bureau of the CCP Central Committee, 97–98
- politics of dispute settlement, 276
- Pompeo, Mike, 277–78
- Pope, 15–16
- Portugal, 61–62
- Position Paper on the UN Reform (2005), 107–8, 116, 117, 120–21
- Posner, Eric A., 5–6, 70, 91
- power, 13, 20, 85–91
- PPP (*See* public-private partnership)
- Pratas Islands (*See* Dongsha Islands)
- Preliminary Founding Members of AIIB (PFM), 187–88
- professional competence, 246
- Programme of Action on the Establishment of a NIEO, 171
- progressive compliance, 102–4
- Proposals on WTO Modernization, 130–31
- Protestants, 15–16
- Protocol on the Accession of the People's Republic of China, 82–84, 128, 129, 131–32, 204
- Prussia, 20
- public-private partnership (PPP), 112–13
- public-public mechanisms, 195–206
- Qiao Guanhua, 176–77
- Qing Dynasty, 65
- Rawls, John, 274
- Realpolitik*, 13, 27–28, 30–31, 37–38, 98–99
- Reforming and Opening-up Policy:
 - and entrepreneurship, 89
 - in interest of individuals vs. community, 91
 - and international organizations, 165
 - and regimes, 101–2
 - as response to lawlessness, 59
 - and socialism, 4–5, 48–49, 50–51, 80–82, 212–13
 - and SOEs, 215–16
 - and “Three Worlds Theory,” 53–54

- regimes, 101–53
 cybersecurity governance as example of, 146
 development, 126–32
 human rights, 137
 international, 113–19
 and international sanctions, 119
 and investment treaties, 132
 norm compliance in, 102–5
 norm entrepreneurship in, 107–12
 peace/security, 113
 WTO, 126
- Regulation 2016/1036, 129
- Regulation for the Implementation of the
 Law of the People's Republic of China
 on the Procedures for the Conclusion of
 Treaties, 96
- Reilly, James, 122–23
- religion, 15, 16–19, 56–57, 64–67
- renascent civilized states, 61–66
- Republic of China (ROC), 30–31, 46–47, 65, 77,
 177, 282, 283, 295
- Request for an Advisory Opinion Submitted
 by the Sub-Regional Fisheries
 Commission*, 290–91
- Responsibility and Obligations of States with
 respect to activities in the Area*, 290–91
- Responsibility to Protect* (ICISS), 115
- responsibility to protect (R2P), 115–19
- revisionist powers, 3, 41
- “revisionist” socialist, 46–48
- revolutionary states, 4
- The Rise and Fall of Great Powers* (Kennedy), 69
- Roberts, Anthea, 236–37
- ROC (See Republic of China)
- Rome Statute of the International Criminal
 Court, 24–25, 168–70
- Roosevelt, Franklin D., 53
- Rosario, Albert del, 312
- R2P (responsibility to protect), 115–19
- Rule-by-Law Decision (2014), 60–61, 90
- rule-of-law states, 56–58
- rule-of-man states, 56–58
- Rules Concerning the Resolution of Some
 Issues of Foreign-Related Cases, 206–7
- Ruskola, Teemu, 59, 61
- Russia, 20, 46, 103–4, 110–11, 118, 150–52, 166,
 169–70, 184–87 (See also Soviet Union)
- Rwanda, 114, 119–20
- SAA (See Statement of Administrative Action
 of 1994)
- sanctions, 119
- San Francisco Conference (1945), 177
- SASAC (See State-owned Assets Supervision
 and Administration Commission)
- Saudi Arabia, 310–11
- Schachter, Oscar, 313
- Schermers, Henry G., 156
- Schwarzenberger, Georg, 21, 280–81
- SCJ (See Supreme Court of Japan)
- SCM Agreement (See Agreement on Subsidies
 and Countervailing Measures)
- SCO (See Shanghai Cooperation Organization)
- SCS (See South China Sea)
- S&D (special and differential treatments), 71,
 127–28, 291–92
- Second Chinese “Comfort Women” case*, 256–57
- secularization, 16
- security, 113
- Shanghai, China, 247
- Shanghai Cooperation Organization (SCO),
 110–11, 150–52, 183–87, 192, 193
- Shanghai Five, 184–85
- Shantou City Intermediate People's Court, 262
- Shea, Dennis, 130–31, 308
- Shenzhen Chengjie'er Trade Co., Ltd.
 Case*, 250–51
- Siamxanxai* (oil tanker), 262
- Silk Road, 97–98
- Simma, Bruno, 17–18
- Singapore, 172, 217–18, 221
- Sino-British Joint Declaration on Hong
 Kong, 205–6
- Slaughter, Anne-Marie, 239–40
- smart power, 22
- SOCBs (See state-owned commercial banks)
- socialist market economy, 83–84
- SOEs (See state-owned enterprises)
- SOI (See Statement of Interest)
- SOM (See China-ASEAN Senior Officials'
 Meeting)
- South Africa, 119–20
- South China Sea (SCS), 8, 167, 261–62, 294,
 303, 312, 315
- South China Sea Tribunal, 267–68, 281, 294,
 303, 312, 315
- Southeast Asia, 172
- sovereign equality, 23n51, 23
- Soviet Union:
 in Cold War, 172–73
 deterioration of relationship between China
 and, 53–54, 177–78
 role in international community, 19–20
 as socialist state, 46, 71, 75–77, 78–82, 84–85
 and UN, 158–59
 See also Russia

- Spain, 61–62
 SPC (*See* Supreme People's Court)
 special and differential treatments (S&D), 127–28, 135–36, 291–92
 spirit of laws, 30
 Spratly Islands (*See* Nansha Islands)
 Standing Committee of the NPC (NPCSC), 197–98, 243, 245
 state capitalism, 83
 state identity, 41–99
 and behavior, 43
 and changing power, 85–91
 and conventional thinking, 69–70
 developing vs. superpower, 52–54
 and domestic governance, 94
 evolution of China's, 46–67
 falling civilized vs. renascent civilized, 61–66
 and ideology, 75
 and international legal policies, 69–97
 orthodox socialist vs. “revisionist” socialist, 46–48, 80
 “revisionist” socialists, 80
 rule-of-man vs. rule-of-law, 56–58
 and strategy/methodology, 67
 State Immunity Convention (2004), 253–54, 258
 Statement of Administrative Action of 1994 (SAA), 316
 Statement of Interest (SOI), 206–7
 State-owned Assets Supervision and Administration Commission (SASAC), 215–16, 220
 state-owned commercial banks (SOCBs), 221–22, 223, 225–26
 state-owned enterprises (SOEs), 7, 82–83, 130–32, 156–57, 213, 215–28, 231
 states authority, 261
 Stets, Jan E., 44
 Stimson, Henry L., 30–31
 Stimson Doctrine, 30–31
 superpowers, 52–54, 157–62
 Supreme Court of Japan (SCJ), 256–58
 Supreme People's Court (SPC), 111–12, 207–8, 241–48, 244n57, 250–53, 264
 Suri, Manik V., 94–95
 Syria, 178

 TAC (*See* Treaty of Amity and Cooperation in Southeast Asia)
 Taipei, 310–11
 Taiwan, 88–89, 122–23, 168–69 (*See also* Republic of China (ROC))
 Tajikistan, 184–85
 Tangshan Intermediate People's Court, 255–56
 Tanzania, 135–36
 Taoism, 64–65
 Tehran, 274–75
 Temasek Holdings Pte. Ltd, 217–18
 Thailand, 172, 262
 Thirty Years War, 15–16
 “Three Worlds Theory,” 53–54
 Tiananmen Square incident, 140
 Tianjin Customs District, 250–51
 Tibet, 88–89
 Tokyo Round, 18–19
 TPA (*See* Trade Promotion Authority)
 TPNW (*See* Treaty on the Prohibition of Nuclear Weapons)
 Trade Case Regulations, 250–51, 252–53
 Trademark Law (China), 252–53
 Trade Promotion Authority (TPA), 7
 Transatlantic Trade and Investment Partnership (TTIP), 23–24
 transformation of courts, 250
 Trans-Pacific Partnership, 23–24, 209–10, 228–29
 Treaty-Concluding Procedure Regulation (Draft) (2017) (*See* Regulation for the Implementation of the Law of the People's Republic of China on the Procedures for the Conclusion of Treaties)
 treaty-making mechanisms, 198
 Treaty of Amity and Cooperation in Southeast Asia (TAC), 174–75
 Treaty of Friendship, Alliance and Mutual Assistance, 76–77, 79–80
 Treaty of Nanking (1842), 52
 Treaty on the Prohibition of Nuclear Weapons (TPNW), 24–25, 34–35
 Treaty Procedure Law (*See* Law of the People's Republic of China on the Procedures for the conclusion of Treaties)
 Treaty Procedure Regulation, 202–4
 TRIPS Agreement, 250–51
 Trump, Donald J., 3, 23–24, 91, 161, 228–29, 299–303, 314, 316, 322
 TTIP (*See* Transatlantic Trade and Investment Partnership)
 Tung Pi-wu, 177
 Turkey, 164–65
 “Turning Your Eye to China” (Wen), 68
 Tushnet, Mark, 60

 UDHR (*See* Universal Declaration of Human Rights)
 Uganda, 145

- Ukraine, 310–11
- UN (*See* United Nations)
- UN Charter:
- Article 2 of, 23, 113–14, 158
 - Article 41 of, 124
 - Chapter VII of, 118, 168
 - and cyberspace, 148–50
 - and ICC, 169–70
 - sovereign equality in, 24–25, 30–31
 - use of force in, 16–17, 18
- UN Commission on International Trade and Law (UNCITRAL), 108
- UN Conference on Law of Sea (UNCLOS III), 86–87
- UN Conference on Trade and Development (UNCTAD), 133, 170–71
- UN Convention on Contracts for the International Sale of Goods (CISG), 233–34, 262–63
- UN Convention on the Law of the Sea (UNCLOS), 27, 111–12, 167, 262, 280, 287, 295, 304, 305, 312, 315, 318
- UN Declaration on Principles of International Law, 157–58
- “Under the Heaven” worldview, 80, 97
- UN Diplomatic Conference of Plenipotentiaries on the Establishment of International Criminal Court, 168–69
- UN Educational, Scientific and Cultural Organization (UNESCO), 161
- UN Framework Convention on Climate Change (UNFCCC), 85
- UN General Assembly (UNGA), 24–25, 32–33, 63–64, 70–71, 77, 115–16, 158, 163–64, 168n65, 177–78, 184–85, 286, 324–25
- UN Group of Governmental Experts (UNGGE), 149–52
- Unified National Judicial Examination (UNJE), 246–47
- Union of Soviet Socialist Republics (USSR) (*See* Soviet Union)
- United Kingdom, 20, 29, 38, 53n84, 53, 98, 110, 158–59, 164–65, 181, 182, 187–88
- United Nations (UN), 5–6
- and adjudication, 27–55
 - birth of, 19
 - China as member of, 77, 88–89, 92n325, 102, 115–17, 148–49, 162, 171, 177–80, 284
 - and Dialogue of Civilizations, 63–64
 - sanctions of, 84–85, 120–23, 125–26
 - security mechanisms in, 16–17
 - sovereign equality in, 158
- See also* headings beginning with UN
- United States:
- and American exceptionalism, 321–22, 324
 - as hacking target of China, 147n284, 149–50
 - and *Hostages* case, 274–75
 - and individualism, 209, 221–22
 - as international institution, 156–62, 174–78, 180–82, 196, 228–31
 - and lawfare, 270–71
 - as member of UN, 28n87
 - policies toward international institutions, 5–7
 - role in containing China, 3–4, 113–14, 119–20, 147, 183–84
 - and R2P, 118–19
 - as superpower, 18–31, 53–72
 - trade war with China, 126, 298, 306, 313, 316
- United States—Section 301-310 case of* 1999, 316
- United States Trade Representative (USTR), 6, 130, 299–301, 302–3, 316–17
- Universal Declaration of Human Rights (UDHR), 24–25, 143, 144
- universal periodical review, 107
- UNJE (*See* Unified National Judicial Examination)
- Unlimited War* (Jiao and Wang), 293
- UN Millennium Development Goals, 145
- UN Peacekeeping Capability Readiness System, 92n323
- UN Security Council (UNSC):
- an UN sanctions, 243–44
 - China as member of, 178–79
 - permanent members of, 163–64
 - and prohibition of nuclear weapons, 24–25
 - Resolution 457, 274–75
 - Resolution 461, 274–75
 - Resolution 929, 119–20
 - Resolution 1267, 243–44
 - Resolution 1333, 243–44
 - Resolution 1874, 124, 125
 - Resolution 2094, 125–26
 - Resolution 2270, 125
 - Resolution 2758, 77, 177–78
 - and Rome Statute, 169–70
 - and UN sanctions, 120–25
- UN Sustainable Development Summit, 92n324
- Uruguay Round, 18–19, 316–17
- U.S. Department of Commerce, 221–22, 223, 225–26
- U.S. Department of Defense, 271
- U.S. Model BIT, 277–78
- U.S. National Security Council, 271
- U.S. State Department, 275

- U.S. Trade Act, 316
US—Countervailing Duty Investigation on DRAMS, 221–22
US—Offset Act case, 279–80
U.S.—Poultry case, 289–90
US—Preliminary Anti-dumping and Countervailing case, 288
 U.S.—Singapore FTA, 237
U.S.—Steel Safeguards case, 288, 289–90
 USTR (*See* United States Trade Representative)
- Vienna Convention on the Law of Treaties (VCLT), 103–4, 241, 248, 279–80
 Vietnam, 172, 282
- Wang E'xiang, 246
 Wang Jiangyu, 108, 218
 Wang Xiangshui, 293
 Wang Yang, 68, 90
 Wang Yi, 7–8, 70, 93–94
 Warsaw Pact, 79–80
 WB (*See* World Bank)
 Webster, Timothy, 104–5, 106
 Wen Jiabo, 55–56, 68, 72–73
 Westphalian treaties, 15–16
 White Paper on Fifty Years of Human Rights Development in China, 141
 Withana, Radhika, 273
 Wolff, Christian, 15
 Working Group (China Ministry of Foreign Affairs), 107
 Working Group (NIEO Charter), 171
 Work Injury Insurance Regulations of 2010, 251–52
 World Bank (WB), 77, 80–81, 159, 179
 World Summit (2005), 33, 115–16, 117
 World Trade Organization (WTO):
 Agreement, 82–83
 China's accession to, 82–89, 204–5, 250–51, 252–53, 267–68, 269
 China's compliance with, 6–7, 96–97, 98, 104–5, 216
 developing states in, 68
 dispute settlement in, 282–83, 285, 288–92, 300, 301, 306–18
 Doha Round, 91–92
 effect on China of, 179
 Ministerial Conference (2003), 171
 regime of, 126
 regionalism in, 23–29
 World War II, 16–17, 30–31, 146, 255–57, 258, 313
 WTO (*See* World Trade Organization)
- Wu, Emperor, 56
 Wu Banguo, 197
- Xiamen Maritime Court, 264–65
 Xi Jinping:
 and Asian Infrastructure Investment Bank, 187–88, 189
 and Chinese exceptionalism, 324–25
 Community of Shared Future for Mankind proposed by, 107–8
 on conventional thinking, 70
 on cultural self-confidence, 66–67
 on cybersecurity, 147
 on developing countries, 88–89
 impact on China of, 59
 on international society, 8, 36–37, 89–90
 on Paris Agreement, 93n326
 on reform, 103–4
 on socialism, 51
 on United Nations, 92n323, 93n324
- Xinjiang, 88–89
 Xingzhong Yu, 211
 Xinjiang, 247
 Xisha Islands, 294–95
 Xisha Quando, 296
 Xue Hanqin, 283–84
 Xu Hong, 286–87
- Yanai Shunji, 313
 Yang Guohua, 288, 289–90
 Yangzhu School, 210
 Year of Dialogue of Civilizations, 63–64
 Yemen, 227–28
 Yeomans, Neville, 270–71
 Yoo, John, 5–6, 70
 Yu, Peter, 147n281
 Yugoslavia, 114
 Yunan, 247
- Zhang Naigeng, 204–5, 309
 Zhang Xiangchen, 84, 131–32, 228–29, 306–7
 Zhang Yuejiao, 180–81
 Zhao Hong, 180–81
 Zheng Bijian, 55
 Zheng Guanying, 211
 Zhongsha Islands, 294–95
 Zhongsha Quando, 296
 Zhou Enlai, 78, 97
 Zhou Qiang, 241–42, 264–65
 Zhu Rongji, 87–88
 Zoellick, Robert B., 91–92
 ZOPFAN (Zone of Peace, Freedom and Neutrality), 172–73

Bibliography

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